ARMY PAMPHLET 27-100-47

MILITARY LAW REVIEW VOL. 47

Articles

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[illegible] OF THE ARMY JANUARY 1970

PREFACE

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This Review may be cited as 47 MIL L. REV. (number of page) (1970) (DA Pam 27–100–47, 1 January 1970).

For sale by the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402, Price: $.75 (single copy). Subscription price: $2.50 a year; $.75 additional for foreign mailing.

PAMPHLET
No. 27–100–47

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, D.C., *1 January 1970*

MILITARY LAW REVIEW–VOL. 47

THEY STEP TO A DIFFERENT DRUMMER: A CRITICAL ANALYSIS OF THE CURRENT DEPARTMENT OF DEFENSE POSITION VIS-A-VIS IN-SERVICE CONSCIENTIOUS OBJECTORS*

By Major David M. Brahms**

In this article, the author examines the legal status of the soldier developing religious or philosophical beliefs antithetical to continued active military service. The current Department of Defense policy toward and procedures for processing the individual in-service conscientious objector's request for discharge are analyzed. The author concludes that the interests of neither the objector nor the services are adequately protected by current DOD policy and suggests improved procedures to remedy the situation.

If a man does not keep pace with his companions, perhaps it is because he hears a different drummer.
Let him step to the music which he hears, however measured or far away.[1]

I. INTRODUCTION.

The long dormant problem of the in-service conscientious objector has of late been thrust to the forefront as a concomitant of the increased opposition to the war in Vietnam. The actions of the military in this regard have come under the scrutiny of the news media as well as the federal courts. No longer can the military hope to treat such problems as purely internal matters, to cloak its actions behind a curtain of military privilege or judicial non-reviewability. The note of the "distant drummer" is being heard by the public at large.

The in-service objector finds a significant segment of the civilian community sympathetic to his cause, even to the point of their

*This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Seventeeth Advanced Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] H. THOREAU, WALDEN (1854).

offering him sanctuary in their houses of worship.[2] Myriad agencies exist to provide funds and competent legal counsel to aid his defense efforts. His plight has become newsworthy.

The federal courts have recently shown a penchant to invade the military "sanctuary" established by the Supreme Court in *Orloff* v. *Willoughby*.[3] No longer will they out of hand deny a habeas corpus petition of an aggrieved in-service objector on the grounds that internal military administrative procedures are unreviewable.[4] The issue has been clearly joined; the battle lines have been drawn. Will the military services hear and understand the drummer and respond effectively to his measured beat before the inexorable pressures of adverse publicity or judicial pronouncement force them to do so—perhaps with modes of action ill-suited to their needs?

It is hoped that this article will aid in furthering that end. It will seek to examine in depth the current administrative scheme established by the Department of Defense with regard to in-service conscientious objectors.[5] This scheme was designed to handle the delicate task of rationalizing the traditional rights of the individual to profess and practice his beliefs and the need of the armed services to preserve a disciplined, effective fighting force.

The area of in-service conscientious objection subsumes two different categories of persons. The first are those who profess beliefs which are totally antithetical to any continued participation in military activities of any type. This group corresponds to the Selective Service class I–O.[6] They generally are seeking to terminate their military status through discharge. The second category comprises those service members who object only to participation in combat or activities directly related thereto. This group corresponds to Selective Service Class I–A–O.[7] They ordinarily desire job reassignment to non-combatant positions rather than dis-

[2] *See* The Washington Post, Oct. 7, 1968, § A, at 8, col. 1.

[3] 345 U.S. 83 (1953). "[J]udges are not given the task of running the Army. The responsibility . . . rests upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate army interests as the Army must be scrupulous not to intervene in judicial matters." *Id.* at 93–94.

[4] *See* Cooper v. Barker, 291 F. Supp. 952 (D. Md. 1968); Hammond v. Lenfest, 398 F. 2d 705 (2d Cir. 1968); Crane v. Hedrick, 284 F. Supp. 250 (N.D. Cal. 1968).

[5] Dep't of Defense Directive No. 1300.6 (10 May 1968) [hereafter cited as DOD Dir. 1300.6].

[6] 32 C.F.R. § 1622.14 (1969).

[7] 32 C.F.R. § 1622.11 (1969).

charge. This article will focus its attention only on the problems relating to the former group. It is with this group that the serious conflicts arise. It is here that the confrontation takes place, that is: (1) there is a collision of the services' need to maintain troop strength and the objector's desire for discharge; (2) the moral issue of possible avoidance of a military obligation arises; (3) the strongly held beliefs of the objector and the rigid disciplinary rules of the military society clash. Unlike the case of the service member who objects only to combatant service, the problems engendered by the total objector cannot be solved by recourse to remedies indigenous to the services, such as job reassignment.

It is my intent that the critical analysis which follows achieve two primary goals: (1) a recognition of the possible defects and anomalies present in the current administrative scheme; (2) concern within the armed forces for constructive revision thereof to attain a rational, effective administrative process for balancing the important interests involved. If such action is not taken, it is inevitable that these processes will be redesigned by an unsympathetic outside agency.

The initial question which will be examined is whether conscientious objection is a mere privilege or a right of constitutional dimension. Is the recognition of conscientious objector status by the military services constitutionally required, or is it merely a gratuitous response to policy considerations? The Department of Defense has bottomed its procedures for handling in-service conscientious objector claims on DOD Directive 1300.6, which states that conscientious objection is a mere privilege. The validity of this premise will be considered in light of constitutional history and recent decisions of the United States Supreme Court defining the scope of the first amendment's protection of the right to freedom of religion. The specific administrative procedures established by the aforementioned directive will then be examined to determine whether they comport with minimal standards of administrative due process and afford the claimant his right to equal protection of the laws. This examination will be made in light of the procedures being used to handle both the pre-service conscientious objector and the service member being processed for other types of administrative discharges.

II. CONSCIENTIOUS OBJECTION: A CONSTITUTIONAL RIGHT OR MERE PRIVILEGE?

A. *HISTORICAL ANALYSIS*

A traditional starting point for the discussion of constitutional questions has been to examine their historical background. Such an approach has merit here in that it will better enable the reader to appreciate the current legal position of the in-service objector. It will also provide a background that will permit an informed judgment as to whether conscientious objection is a mere privilege resulting from an exercise of congressional grace or is a constitutional right.

Previous historical analyses [8] of this area have tended to focus on the consideration and apparent rejection by the First Congress of James Madison's constitutional amendment. This amendment, intended to be included as a part of the proposed Bill of Rights, exempted conscientious objectors from active military service.[9] A conclusion which may be drawn therefrom is that conscientious objection may not be brought within the ambit of the first amendment's language, since the First Congress's actions with regard to this area clearly evince a judgment that such is not a right of constitutional magnitude.[10] When viewed against the historical background of the conscientious objector amendment and the political realities of the times, however, this conclusion becomes suspect; and one sees strong evidence that the founding fathers indeed intended to include conscientious objectors under the aegis of the Bill of Rights protections.[11]

1. *Conscientious Objection Prior to 1789.*

Madison's amendment was a reflection of a long standing tradition of respect for and accommodation of the beliefs of religiously oriented conscientious objectors. Perhaps the most important manifestation of this concern may be seen in the following resolution of the Continental Congress:

> That it be recommended to the inhabitants of all the United English Colonies in North America that all able bodied effective men

[8] *See* Conklin, *Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins*, 51 GEO. L. J. 252, 263–64 (1963); Russell, *Development of Conscientious Objector Recognition in the United States*, 20 GEO. WASH. L. REV. 409, 436–38 (1952); *but see* Freeman, *A Remonstrance for Conscience*, 106 U. PA. L. REV. 806, 803–13 (1958).

[9] I ANNALS OF THE CONGRESS OF THE UNITED STATES 434 (1834) [hereafter cited as ANNALS].

[10] Conklin, *supra* note 8 at 263–64; Russell, *supra* note 8 at 436–38.

[11] Freeman, *supra* note 8 at 213.

> between sixteen and fifty years of age in each colony, immediately form themselves into regular companies of militia . . . .
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> . . . .
>
> As there are some people, who, from religious principles cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed country, which they can consistently with their religious principles.[12]

As is clear from the text of this resolution, it was promulgated in a time of great national crisis as the Revolutionary War was imminent. In spite of the crisis and the great need for troops occasioned thereby, respect is urged for freedom of conscience of those religiously opposed to bearing arms.

It is not surprising that the Congress should show solicitude towards such persons. Most of the individual colonies had previously given formal recognition to the objector status by providing a statutory exemption from active militia service for those conscientiously opposed to bearing arms,[13] or by constitutional recognition of the right of freedom of conscience.[14]

Widespread concern for the conscientious objector was also manifested by the several colonies during the period between the drafting of our national Constitution and its subsequent ratification. Four of the thirteen colonies separately indicated their desire that a constitutional exemption from military service be provided for those individuals "religiously scrupulous of bearing arms." [15] In fact, North Carolina conditioned her ratification of the proposed constitution upon the adoption by the new Congress of certain amendments as set forth in a declaration of rights.[16]

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[12] I JOURNALS OF THE AMERICAN CONGRESS 118–19 (1823). To fully appreciate the importance of this resolution as an indicia of the high regard held by Colonial America for the rights of conscientious objectors, it must be viewed in light of the fact that the Continental Congress had no inherent authority to raise an army and was dependent upon its ability to cajole the individual colonies to do so.

[13] During the period prior to 1775 some 600 militia laws were promulgated. After the precedent set by Rhode Island in 1673, these laws generally embodied a clause exempting conscientious objectors from personal military service. Pennsylvania, because of the preponderance of Quakers in its population, had a purely volunteer militia. Russell, *supra* note 8 at 412–14. A complete digest of colonial conscription laws may be found in THE SELECTIVE SERVICE SYSTEM, 2 BACKGROUNDS OF SELECTIVE SERVICE, pt. 1, 34–69 (Special Monograph No. 1, 1947).

[14] For a list of applicable constitutional provisions with exerpts therefrom, see Freeman, *supra* note 8 at 809.

[15] The four states were Virginia, 3 ELLIOTS' DEBATES 659 (2d ed. 1836) [hereafter cited as DEBATES]; North Carolina, 4 DEBATES 244; Pennsylvania, 2 DEBATES 531; and Rhode Island, 1 DEBATES 335.

[16] 4 DEBATES 243–44.

Included, *inter alia*, was the following proposal: "That any person religiously scrupulous of bearing arms ought to be exempted upon the payment of an equivalent to employ another to bear arms in his stead." [17] Virginia also proposed a similar amendment.[18]

Ratification by the State of Rhode Island was seriously delayed by the lack of a Bill of Rights in the new constitution. One of the desired provisions was constitutional protection for the conscientious objector. This desire was manifested to the Congress in the form of a proposed amendment to effect this end similar in text to that of North Carolina.[19] The Pennsylvania legislature, while proposing no formal amendment on the subject, expressed considerable concern during their ratification debates over the lack of constitutional protection for the objector.[20]

In addition, there was a great deal of sentiment expressed by the individual colonies for an amendment safeguarding freedom of religion and conscience.[21] These proposals were symptomatic of a deep disaffection for the new constitution in many quarters. While the bases for such disaffection varied, chief among them was the failure of the constitution to provide affirmative safeguards for what were believed to be fundamental rights, including those of the conscientious objector.[22]

The delays and difficulties in achieving ratification in North Carolina, Rhode Island, Pennsylvania, and New York were in great part attributable to this failure.[23]

2. *Madison's Proposed Constitutional Amendments.*

In response to these forces and certain personal political realities, James Madison, as the duly elected representative from Virginia, proposed a number of constitutional amendments at the first session of the House of Representatives. Although not initially a strong supporter of a Bill of Rights,[24] Madison's ardor for

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[17] *Id.* at 244.

[18] 3 DEBATES 659.

[19] 1 DEBATES 335.

[20] 2 DEBATES 531.

[21] E. DUMBAULD, THE BILL OF RIGHTS 1–33 (1957) [hereafter cited as DUMBAULD].

[22] R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776–1791, at 126–58 (1955) [hereafter cited as RUTLAND].

[23] *Id.*

[24] "My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission a material defect, nor been anxious to supply it even by *subsequent* amendment, for any other reason than that it is anxiously desired by others. I have favored it because I supposed it might be of use, and if properly executed could not be of disservice. I have not viewed it in an important light, 1. because I

such was increased by the necessities of a hotly contested election for the seat he desired in the House of Representatives. Rumors were spread by persons opposed to Madison's candidacy, led notably by Patrick Henry, that Madison was not in favor of amending the new constitution.[25] Upon the strong urging of his backers,[26] Madison announced his support for appending a Bill of Rights to the new constitution. It is generally conceded among historians that this shift of position was a material factor in Madison's election victory.[27] There is also some indication that Madison's change of position may have been influenced by the strong views expressed by Jefferson in favor of amending the Constitution.[28]

Included among Madison's amendments were three of particular significance here:

> 1. . . . [T]he civil rights of none shall be abridged on account of religious belief or worship, nor shall the full and equal rights of conscience be in any manner or on any pretext, infringed. 2. . . . [T]hat the right of the people to bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person. . . . 3. . . . [T]he exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.[29]

The debates which followed the introduction of these amendments in committee and later in the House proper were heated

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conceive in a certain degree, though not in the extent argued by Mr. Wilson, the rights in question are reserved by the manner in which the federal powers are granted; 2. because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power. One of the objections in New England was that the Constitution by prohibiting religious tests opened the door for Jews, Turks, & infidels; 3. because the limited powers of the federal Government and the jealousy of the subordinate Governments, afford a security which has not existed in the case of the State Governments, and exists in no other; and 4. because experience proves the inefficacy of a bill of rights on those occasions when its control is most needed." Letter from James Madison to Thomas Jefferson, 17 Oct. 1788, 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 85, 86–87 (1905) [hereafter cited as DOC. HIST.].

[25] RUTLAND, supra note 22, at 190.

[26] Letter from George Nicholas to James Madison, 2 Jan. 1789, 5 DOC. HIST. 137.

[27] DUMBAULD, *supra* note 21, at 33.

[28] *Id.* at 8. *See also* letter from Thomas Jefferson to James Madison, 15 Mar. 1789, 5 DOC. HIST. 161–62.

[29] I ANNALS 434–35.

and lengthy. Great concern was expressed by some that an enumeration of rights would lead to the derogation of those not specified.[30] Madison attempted to allay these fears by arguing that his third proposed amendment provided a safeguard against such.[31]

With respect to the first of these propositions, the debates mainly concerned the semantics of expressing the desired limitation of the Federal Government's power.[32] On 20 August 1789, the House finally agreed to the following language: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." [33]

Proposition number two also engendered considerable debate. Elbridge Gerry worried that the people in power might be able to subvert the Constitution by defining who fell within the category of "religiously scrupulous" and thus limit to their advantage the groups who would be competent to bear arms. For this reason he proposed limiting the exemption to persons of recognized pacifist sects.[34] Unsuccessful efforts were made to insert a provision requiring the objector to provide a substitute.[35] Considerable other objection to this proposed amendment was encountered, but with one exception,[36] none of the opponents based his opposition on the grounds that conscientious objection was not a substantial right of constitutional magnitude. Rather, their objections were bottomed primarily on a fear that the amendment might weaken the militia and thereby create the need for recourse to a standing army, the latter being anathema.[37]

Madison's second proposal was finally adopted by the House of Representatives as was his third in substantially the same form

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[30] *Id.* at 442.

[31] *Id.* at 439. It is interesting to note Madison's shift in position on this matter from that expressed in his letter to Jefferson of 17 Oct. 1788, *supra* note 24.

[32] I ANNALS 730.

[33] *Id.* at 766.

[34] *Id* at 749.

[35] *Id* at 750–51.

[36] Representative Benson of New York, having moved to delete the conscientious objector exemption, argued that it was not a "natural right" and that to enact such an amendment would create problems of judicial interpretation with respect to every militia bill thereafter enacted. *Id.* at 751. He also apparently believed that such an amendment was unnecessary to safeguard the objector: "I have no reason to believe but the Legislature will always possess humanity enough to endulge this class of citizens in a matter they are so desirous of, but they ought to be left to their discretion." *Id.*

[37] *Id.* at 766–67.

as originally submitted.[38] All of the proposed amendments, including the three upon which we have focused, were passed by the House and sent to the Senate for that body's concurrence.

Propositions one and two were substantially modified by the Senate. While we can trace the procedural steps by which this was effected, unfortunately, we have no way of knowing the rationale behind the changes and deletions which were made. The early sessions of the United States Senate were closed and no comprehensive record of their debates exists.[39]

From the limited records available, we learn that the House version of proposition one, respecting freedom of religion, was adopted by the Senate minus the phrase "nor shall the rights of conscience be infringed." [40] What remained of Madison's amendment was later combined with provisions safeguarding freedom of speech, press, and assembly to form what is now our first amendment.[41]

Proposition number two was modified in pertinent part by the deletion of the provisions exempting conscientious objectors from personal active military service.[42] Only one-third of the propositions emerged from the Senate without significant change.[43]

All three of these propositions were, along with nine others, referred to the individual states for ratification. On 15 December 1791, with ratification by the State of Virginia, they became respectively the first, second, and ninth amendments to the Constitution of the United States.

3. *Significance of the Historical Background.*

What impact does this constitutional history have on the question: Is conscientious objection a constitutionally protected right? While it must be admitted that some of the evidence presented is equivocal with respect to this matter, it is submitted that a strong argument can be made that the founding fathers considered conscientious objection to personal military service based on traditional religious principles to be a right. The foregoing consideration of the debates preceding the adoption of the Bill

[38] An excellent comparison of the amendments submitted by Madison and those finally agreed on by the House of Representatives may be found in DUMBAULD, *supra* note 21, at 206–09.

[39] *Id.* at ix.

[40] I ANNALS 740.

[41] DUMBAULD, *supra* note 21, at 45 n.4, *citing* I JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE 129 (1828).

[42] *Id.* at 46 n.6, *citing* I JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE 129 (1828).

[43] *Id.* at 47.

of Rights clearly shows that the prime architect thereof, James Madison, and the majority of his fellow Congressmen believed that such beliefs were cognizable as an individual right of sufficient importance to be embodied specifically in a proposed constitutional amendment. It is also known that considerable sentiment for such amendment was shown by several of the individual states. Yet in spite of this the Senate deigned not to adopt any specific language recognizing such in its version, and no specific language appears any where in the Bill of Rights as ratified.

Does this mean, as is generally assumed, that the founding fathers rejected conscientious objection as a right of constitutional stature? It is submitted that this is not the case.

After the Senate completed action on the proposed amendments, they were returned to a joint Senate-House conference committee. The language emerging therefrom was essentially that proposed by the Senate.[44] If the language of the Senate version were adopted with the purpose of eliminating the right of conscientious objection, it is likely that the former proponents would have attempted to revitalize the deleted provisions. At least, these men, recalling the difficulties encountered in achieving ratification of the Constitution and the strong sentiment of their constituencies in favor of incorporating such rights under the aegis of constitutional protection, would have sought a compromise solution. Further, it would be expected that the strong advocates of these provisions in the House, who just a few weeks earlier had spoken with deep conviction in behalf of these rights, would raise their voices in protest. Yet no strong objection to nor any concerted effort to revitalize the deleted language was made in the House of Representatives.[45]

A deletion of the rights in question from the Bill of Rights would have represented a grave personal and political defeat for James Madison. It would be expected that having made such a strong commitment to these provisions, he would evince displeasure or disappointment with regard to their lack of success in the Senate. Yet his published letters of this period fail to indicate such.[46] In light of the manifest colonial tradition of recognizing

[44] A comparison of these may be found in *id.* at 217–22.

[45] The changes proposed by the Senate were adopted with only minor variations by the House without floor debate. I ANNALS 913.

[46] In a letter dated 14 Sep. 1789 sent to Edmund Pendleton, Madison complains, "The Senate have sent back the plan of amendments with some alterations which strike in my opinion at the most salutary articles." He goes on to complain bitterly about this, mentioning the changes relating to venue of courts and the value limitation set on appeals. There is no mention of

conscientious objection as a right, the inaction on the part of Madison or any of his fellow representatives with regard to the Senate's action deleting the specific provisions relating to exemption from personal military service is strong evidence that they believed that the significant principles involved were adequately safeguarded by the remaining sections of the "Bill of Rights." [47] The right of conscientious objection was either encompassed by the proposition relating to freedom of religion, which became our first amendment,[48] or came under the aegis of the provision guaranteeing the sanctity of those nonenumerated rights retained by the people, which became our ninth amendment.[49]

B. *RIGHT OR PRIVILEGE: AN ANALYSIS OF THE JUDICIAL POSITION*

Do current Supreme Court interpretations of the first amendment support the thesis, developed from the foregoing historical analysis, that conscientious objection is a right of constitutional magnitude? It should be noted at the outset that while the Court has come to grips with the general issue of whether conscientious

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the changes relating to freedom of religion, or the omission of the right to freedom of conscience or the exemption for conscientious objectors. 5 DOC. HIST. 205.

[47] "For a week past the subject of amendments has exclusively occupied the H. of Reps. Its progress has been exceedingly wearisome not only on account of the diversity of opinion that was to be apprehended, but of the apparent views of some to defeat by delaying a plan short of their wishes, but likely to satisfy a great part of their companions in opposition throughout the Union. It has been absolutely necessary in order to effect anything, to abbreviate debate, and exclude every proposition of a doubtful & unimportant nature." Letter from James Madison to Edmund Randolph, 21 Aug. 1789, 5 DOC. HIST. 191–92. As can be seen from this letter, only amendments considered to be of the utmost importance went to the Senate. Clearly these were "bare bones" proposals on which little compromise of principle could be made.

[48] *See* Freeman, *supra* note 8, at 812.

[49] With the Supreme Court's "rediscovery" of the ninth amendment in Griswold v. Connecticut, 381 U.S. 479 (1965) (prior to this cause the Court had cited this amendment in only five previous cases; see the concurring opinion of Goldberg, J., *id.* at 487) and its extension beyond the limited scope previously assigned to it of protecting political rights (*see* United Pub. Workers v. Mitchell, 330 U.S. 75 (1946), the possibility of this amendment being used to cover a non-enumerated right such as conscientious objection becames a real possibility. It is interesting to note that Justice Goldberg's concurring opinion, which stated that a right to marital privacy fell within the aegis of the ninth amendment, was bottomed on a constitutional historical analysis much like that done above. 381 U.S. at 486–99 (concurring opinion).

[50] Hamilton v. Regents of the Univ. of California, 293 U.S. 245 (1934); United States v. Macintosh, 283 U.S. 605 (1931); *In re* Summers, 325 U.S. 561 (1945).

objection is a right,[50] it has never decided the more specific question: May a man be forced by sanction of criminal law to perform military service which is contrary to his sincerely held religious beliefs?[51]

As will be seen, the cases touching on the general issue have not involved the enforcement, by means of a criminal sanction, of some "duty" allegedly owed by the objector, but the much less constitutionally onerous situation in which an objector is denied some benefits or advantage based on his beliefs.[52] The Supreme Court has, with respect to the latter class of cases, adopted a position that conscientious objection is not a constitutional right. However, the question remains, whether, in light of recent decisions of the Court, this line of cases retains significant precedental value? Assuming its continued vitality, another question arises: Can such precedent be generalized to cover the former class of cases in light of the Courts' recent pronouncements in the area of freedom of religion?

The celebrated dictum of Justice Harlan appearing in the case of *Jacobson* v. *Massachusetts*[53] to the effect that a person could be compelled to go to war in defense of his country regardless of his personal scruples is the first significant judicial pronouncement in this area. In *United States* v. *Macintosh*, Justice Sutherland reiterated this dictum:

> The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him.[54]

Following this dictum, in the case of *Hamilton* v. *Regents of the University of California*,[55] the Court in 1934 upheld the authority of the State of California to compel participation in a Reserve Officers Training Corps as a prerequisite to attendance at the University of California. The Court held that there was no constitutional right to avoid bearing arms. Since attendance at the University was not compulsory, the petitioners were obligated to obey the rules promulgated by the State and the University or pursue their educational goals elsewhere.

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[51] Comment, *God, The Army, and Judicial Review: The In-Service Conscientious Objector*, 56 CALIF. L. REV. 379, 395 (1968).

[52] *See* United States v. Macintosh, 283 U.S. 605 (1931); Hamilton v. Regents of the University of California, 293 U.S. 245 (1934); *In re* Summers, 325 U.S. 561 (1945).

[53] 197 U.S. 11 (1905).

[54] 283 U.S. 605, 623 (1931).

[55] 293 U.S. 245 (1934).

In re Summers [56] is the last and most recent case following the precept laid down in *Macintosh* and *Hamilton*. In a five to four decision the Supreme Court upheld the denial of a pacifist's right to practice law because his convictions made it impossible for him to take an oath to uphold the Illinois State Constitution, which includes a provision requiring militia service in time of war.

It would seem at first blush that this line of cases ending with *Summers*, which is squarely based on constitutional interpretation, disposes of the issue: Is conscientious objection a constitutional right or a mere privilege? Nevertheless, a close examination reveals otherwise. The keystone of this line of cases, *United States* v. *Macintosh*,[57] was overruled in *Girouard* v. *United States*.[58] Not only was the holding of the case overturned but by its language the *Girouard* Court clearly sounded the death knell for the *Macintosh* dictum as well.[59] With the demise of the progenitor, *Macintosh*, its progeny, *Hamilton* and *Summers*, have been weakened and lost much of their viability as precedent.

As Professor Mansfield notes, even if *Summers* is still good law it does not conclusively answer the question: Is conscientious objection constitutionally grounded? It and its predecessors, at best,

> stand only for the proposition that in certain circumstances the interests of the government are sufficient to justify requiring a conscientious objector to forego his conscientious scruples if he wishes to obtain certain advantages or benefits. This is still some distance from saying in time of peace or war the government may use the criminal law to compel a person to perform military service when to do so would violate his conscience.[60]

The thrust of these cases has been further enervated, if not finally laid to rest, by the case of *Sherbert* v. *Verner*.[61] Mrs. Sherbert, a Seventh Day Adventist, was denied unemployment benefits

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[56] 325 U.S. 561 (1945).
[57] 283 U.S. 605 (1931).
[58] 328 U.S. 61 (1946).
[59] "The struggle for religious liberty has through the centuries been an effort to accommodate the demands of a state to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the state. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the Authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle. As we recently stated in *United States v. Ballard*, 322 U.S. 78, 86, 'Freedom of thought, which includes freedom of religious belief, is basic in a society of free men.' " *Id.* at 68–69.
[60] Mansfield, *Conscientious Objection 1964 Term*, 1965 RELIGION AND THE PUBLIC ORDER 1, 66.
[61] 374 U.S. 398 (1963).

under a South Carolina statute which conditioned eligibility on an applicant's availability for and acceptance of proffered suitable work. The denial was based on the appellant's unwillingness to accept employment which required her to perform work on Saturdays in contravention of the Sabbatarian rules of her faith. The Supreme Court stated:

> [T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.[62]

The Court, in deciding in her favor, weighed the burden upon Mrs. Sherbert's exercise of freedom of religion under the first amendment against the law coercing her to choose between following her religion or forfeiting certain benefits. It concluded that where there is governmental interference with or burden upon freedom of religion, such can be sanctioned only where the religious practice conflicting with the law in question constitutes a grave abuse endangering paramount interests of the Government, and no other reasonable course of governmental action is available to combat this abuse.[63]

Having extended the aegis of first amendment protection to Mrs. Sherbert, can the Supreme Court logically deny such to the conscientious objector? It would appear not.[64] The intrusion upon the objector's exercise of religious freedom is manifestly greater than that imposed on Mrs. Sherbert. The Government is not merely denying the conscientious objector a benefit as a result of his failure to compromise his religious precepts, but threatening the imposition of criminal sanctions for his actions or inaction. It is extremely doubtful that the Government could sustain its burden under *Sherbert* to show that an exemption for conscientious objectors from personal military service poses a serious threat to

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[62] *Id* at 406.

[63] "Governmental imposition of such a choice puts the same kind of burden on the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

"Nor may the South Carolina court's construction of the statute be saved from the constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.* at 404.

[64] *See* Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 VA. L. REV. 1355, 1389–93 (1968). *See generally*, Comment, *The Conscientious Objector and the First Amendment: There But for the Grace of God . . .*, 34 U. CHI. L. REV. 79 (1966).

the admittedly substantial interest of a country to be able adequately to defend itself.[65]

The rationale of the *Sherbert* case when married with the leading case under what is known as the accommodation theory of the meaning of the first amendment, *Zorach* v. *Clauson*,[66] provides yet another strong argument for a constitutional right to be a conscientious objector. Under the accommodation theory, the free exercise clause predominates over the establishment clause of the first amendment. By its laws, the Government is required to establish a favorable milieu for free exercise of religion by its citizens over a broad range of constitutionally protected religious activity. As a concomitant, the establishment clause is limited to a role of preventing governmental preference among religions.[67]

> Under the doctrine of *Zorach* and the logic of *Sherbert*, the government would be required to accommodate the needs of national defense to the religious needs of its people, and provide an exemption for the conscientious objector.[68]

C. *SCOPE OF THE RIGHT*

Assuming the existence of a constitutional right to conscientious objection, the question of its scope remains. Does this right extend only to those persons whose objection is grounded upon a sincere belief in the precepts of a historical pacifist church or sect? Does it extend to the protection of those individuals at the other end of the spectrum who oppose personal participation in military activities on non-religious grounds? Is the "selective objector," whose opposition to participation is limited to unjust wars, protected?

From a historical viewpoint, any right which exists would seemingly be limited to those persons of orthodox religious persuasion belonging to historic peace churches. The historical antecedents to the Bill of Rights discussed above clearly indicate that our forefathers were concerned with protecting a limited class of persons, certainly not extending beyond those whose objection was religiously motivated.

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[65] With regard to the in-service objectors it may actually be beneficial to the orderly functioning of the services to eliminate such persons. Rather than being an asset they are a liability. The writer's personal experience indicates they clearly have no motivation to perform productive work, having already decided that they cannot participate in military activities of any kind. They are disciplinary problems whose presence is generally disruptive of good unit morale.

[66] 343 U.S. 306 (1952).

[67] Comment, *The Conscientious Objector and the First Amendment: There But for the Grace of God . . .*, 34 U. CHI. L. REV. 79, 91 (1966).

[68] *Id.* at 91.

The colloquial definition of permissible conscientious objection, as may be seen in the practice of the Congress, accords with this limited scope.[69] While not of constitutional origin, the congressional reluctance to extend its statutory conscientious objector exemptions beyond those persons whose objection was religiously grounded is evidence of common agreement on the traditional, historically permissible limits of such objection.

In light of the Supreme Court's reasoning in *Sherbert* v. *Verner*,[70] to the effect that the free exercise clause of the first amendment permits no discrimination among religious faiths, and the broad definition of "religion" implicit in its holding in the *Seeger* case,[71] it is clear that adoption of the traditional, historic scope of the right would require including thereunder not only all persons whose objection was bottomed on recognized formal religious precepts, but also any person whose objection is grounded in beliefs which occupy "a place in the life of its possessor parallel to that filled by an orthodox belief in God. . . ." [72]

To the extent that an objector's reluctance to participate in a particular war is based on precepts of a religious belief as defined above, it would seem that such would fall under the aegis of the constitutional protection. To fail to accord protection to one who selectively opposed participation in a war pursuant to a religious precept, such as that of the "unjust war," [73] would be to establish a denominational preference.[74]

As can be seen, the scope of the constitutionally required exemption would be very broad, encompassing not only the members of the historical peace churches, but all whose beliefs are bottomed on religious or quasi-religious beliefs, including those whose religious objection is to a particular war.[75]

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[69] A complete history of and textual excerpts from all conscientious objector provisions contained in United States draft laws through 1948 may be found in Russell, *supra* note 8 at 417–29.

[70] 374 U.S. 398 (1963).

[71] United States v. Seeger, 380 U.S. 163 (1965). *See* Macgill, *supra* note 64, at 1365–71.

[72] United States v. Seeger, 380 U.S. 163, 166 (1965). *See* Dorson and Rudovsky, *Some Thoughts on Dissent, Personal Liberty and War*, 54 *A.B.A.J.* 752, 756 (1968).

[73] A good discussion of the theological concept of an "unjust war" may be found in Macgill, *supra* note 64, at 1372–77.

[74] "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." Everson v. Bd. of Educ., 330 U.S. 1, 15 (1946).

[75] *See* Dorson and Rudovsky, *supra* note 72, at 756–57. *See also* the recent

III. IN-SERVICE OBJECTION: A CONSTITUTIONAL RIGHT OR MERE PRIVILEGE?

Having arrived at the position that conscientious objection, as a general proposition, is a constitutionally protected right, the issue arises whether, in light of the unique status of active duty military personnel, such right may be claimed by the in-service objector.

While it is clear that the donning of a uniform results in an encroachment upon an individual's constitutional rights, there is not, however, a total deprivation of such rights. "The protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable are available to our serviceman."[76]

The military status itself, therefore, does not render inapplicable the right to conscientious objection. It is true that no constitutional right is absolute; its existence derives from a balancing between the interests of the individual protected by the constitutional provision in question and the impact of such upon those rights inherent in society. There does not appear to be any serious conflict with a paramount right in or an undue impact upon the military or the Federal Government which would result from extending the protection to the in-service objector.

The Government's right to defend itself would not appear to be unduly affected thereby. Certainly, if there were any evidence that granting an exemption to in-service objectors would result in material interference with the operations of the armed forces, the Department of Defense would not have voluntarily set up an administrative machinery to accomplish this end.[77] From all indications, it appears that the number of in-service objectors is lim-

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opinion of Judge Wyzanski in *United States v. Sisson*, 295 F. Supp. 520 (1968), indicating that the aegis of the first amendment's protection extends to non-religious objectors.

[76] United States v. Jacoby, 11 U.S.C.M.A. 428, 430, 29 C.M.R. 244, 246 (1960), *citing* Burns v. Wilson, 346 U.S. 137 (1953); Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947); United States v. Hiatt, 141 F. 2d 664 (3d Cir. 1944). *See also* Warren, *The Bill of Rights and the Military*, 37 N. Y. U. L. REV. 181, 188 (1962).

[77] The Department of Defense has had formal administrative procedures established for processing in-service conscientious objector claims, since 1962. Comment, *God, The Army and Judicial Review: The In-Service Conscientious Objector*, 56 CAL. L. REV. 379, 401 n. 92 (1968), *citing* letter from Major General Kenneth G. Wickham, The Adjutant General of the Army, to Robert E. Montgomery, Jr., 7 Dec. 1967, on file with the California Law Review.

ited.[78] The impact upon the services' effectiveness from the loss of such persons and the administrative burdens occasioned by their processing would appear to be reasonable.

The writer's personal experience with in-service objectors and the clear behavior pattern manifested in the reported cases [79] indicate that when the services force a sincere objector to continue in an active duty status, the usual, and perhaps expected, result is a recalcitrant soldier prone to disciplinary trouble. When the in-service objector is forced to choose between adhering to military law and being true to his beliefs, the latter alternative usually prevails. He, as a matter of course, commits violations of orders (albeit, usually from a sublime motive, but violations nevertheless). His presence is often disruptive of unit discipline. The time spent disciplining him is extensive. His productivity and usefulness as a member of the armed forces is significantly reduced by virtue of his lack of motivation. Most, if not all, potential tasks which may be assigned violate his religious precepts, with the result that the objector will refuse to perform them. Therefore, it appears that according all sincere objectors freedom from continued personal military service might actually have a positive effect on military efficiency, morale and discipline.

It is clear from the foregoing discussion that strong arguments exist both from a historical point of view and a judicial interpretive view that in-service conscientious objection is protected by a constitutional right. At least, these arguments are sufficiently strong to belie the Department of Defense position that conscientious objection is a mere privilege subject to the vagaries of changing policy.

IV. ANALYSIS OF THE DEPARTMENT OF DEFENSE DIRECTIVE

Has the failure of the Department of Defense to recognize the constitutional mandate of conscientious objection led to the establishment of procedures for dealing with this matter which deny

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[78] The general incidence of conscientious objection in the United States is currently and has been historically relatively small. Comment, *The Conscientious Objector and the First Amendment: There But for the Grace of God . . .*, 34 U. CHI L. REV. 79, 88–89 (1966). This fact coupled with the screening process of the Selective Service vis-a-vis draftees and the logical incompatibility of volunteering for the armed service and a pacifist ideology contribute to the low incidence of in-service conscientious objection.

[79] *See* Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968); Cooper v. Barker, 291 F. Supp. 952 (D. Md. 1968).

the objector his right to basic administrative due process and equal protection of the laws?

If one accepts the view that conscientious objection is a constitutional right applicable to the in-service objector, it would logically follow that any service member who fits the definition of conscientious objector, set out above,[80] would have to be discharged from the service upon his request and proof of the sincerity of his beliefs. Failure to do so would impose an unconstitutional burden upon his right to free exercise of religious belief.

A. *POLICY GUIDELINES*

Examination of the policy guidelines set forth in the applicable *Department of Defense Directive*[81] reveals that the recognition of a member's conscientious objection by the armed services is not deemed to be a right; that discharge prior to the termination of any period of obligated service is "discretionary with the military service concerned, based on judgment of the facts and circumstances in the case."[82] Recognition of such beliefs by the armed forces is to be made only to the extent "practicable and equitable."[83]

It is clear that these guidelines do not provide protection for any constitutional right which may exist. They contemplate an ad hoc determination of the propriety of discharge unrelated to any rights which an individual may claim. Further, the language and tenor of this directive precludes the implementing regulations required of each service from being written broadly enough to accommodate a claim of constitutional right by an in-service objector.

B. *SCOPE OF DIRECTIVE'S DEFINITION OF CONSCIENTIOUS OBJECTION*

Assuming, arguendo, that the various services find it "practicable or equitable" to recognize all requests for classification as a conscience objector submitted by their members who meet the DOD definition of conscientious objection,[84] would such practice vitiate the constitutional objections to the *DOD Directive* and the individual service regulations promulgated pursuant thereto? It

[80] See text accompanying notes 69–75, *supra*.
[81] DOD Dir. 1300.6, *supra* note 5.
[82] *Id.* at § IV Bl.
[83] *Id.* at § IV B.
[84] It is clear that such a policy is not in fact being followed. *See* Hammond v. Lenfest, 398 F. 2d 705 (2d Cir. 1968); Cooper v. Barker, 291 F. Supp. 952 (D. Md. 1968).

is submitted that the extremely narrow concept of who falls within the aegis of the term "conscientious objector" implicit in these orders precludes its validity under the constitutional precepts espoused above. The definitions contained therein specifically exclude selective objectors [85] or persons whose opposition to service is based on political, sociological, or philosophical views, or on a personal moral code.[86] This definition purports to be the same as that adopted by the Congress in section 6(j) of the Military Selective Service Act of 1967, 50 U.S.C. App. § 456(j) (1967), which would subsume under its aegis the "quasi religious" objector, such as Daniel Seeger with a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for an exemption. . . ." [87] In spite of this similarity of language, the explanatory provisions of the directive, its procedures and the criteria set forth therein, manifest, if not a conscious derogation from the scope of the congressional definition, at least a tacit predeliction to do so, which logically results in an operational definition of rather narrow scope. The directive does not extend its protection to many who fall within the scope of the constitutional right as delineated above.[88]

For example, the directive nowhere indicates that persons who have no connection with any formal religious sect may, as did Seeger, qualify for classification as an objector. In the instructions there can be found no definition, explicit or implicit, of "religious training" which would include a Seeger type objector. The issue of what constitutes such training and belief is skirted. Implicit in the language used throughout the instructions, however, is a concept of traditional, formal religion,[89] rather than the broader concept espoused by the Supreme Court in *Seeger*.

Whether one is prepared to accept the constitutional basis for conscientious objection or not, the aforementioned lack of breadth of scope in the *Department of Defense Directive* appears to trespass upon the inviolate ground of religious non-discrimination staked out by the Supreme Court in *Sherbert* v. *Verner*,[90] and as refined in *United States* v. *Seeger*.[91] The explicit caveat of Justice Douglas, that an exemption less broad than that provided by Con-

[85] DOD Dir. 1300.6, *supra* note 5, at § IV B.
[86] *Id.* at § V.
[87] United States v. Seeger, 380 U.S. 163, 176 (1965).
[88] See text accompanying notes 69–75.
[89] *See* DOD Dir. 1300.6, *supra* note 5, at § VI.
[90] 374 U.S. 398 (1963).
[91] 380 U.S. 163 (1965).

gress in the Universal Military Training and Service Act of 1964, as interpreted by the Court in *Seeger*, would violate the free exercise clause of the first amendment and result in a denial of equal protection,[92] has been transgressed. The *Department of Defense Directive* too narrowly defines the term, conscientious objector, and its language operates to establish a preference for some religions. Those religions with a formal, traditional organization and liturgy are recognized to the exclusion of the individualized religion of a Seeger type, which lacks many of the usual formal trappings.

The fact that the discriminatory language appears in an executive directive, rather than a statute, is of no import in deciding whether by it operation it is in violation of an individual's right to equal protection of the laws. In 1956, title 10 of *United States Code* was codified and the once important distinction between regulations promulgated pursuant to specific statutory authority and those not so authorized was mooted. Previously, only the former had the force and effect of law, but now Department of Defense directives, such as the instant one, and their service department implementing regulations stand on an equal footing with federal statutes.

C. *ADMINISTRATIVE DUE PROCESS UNDER THE DOD DIRECTIVE*

Perhaps the most notorious shortcoming of the new *Department of Defense Directive* is its failure to delineate fact finding procedures which accord with the individual claimant's right to administrative due process. Clearly if one accepts the view that conscientious objection is a constitutionally safeguard right, the procedures adopted to discover the facts necessary to determine whether an individual's claim to such right is meritorious must at least meet the traditional tests of administrative due process.[93] Likewise the right to administrative due process exists if the position is adopted that conscientious objection is something less than an absolute constitutional right.

The federal courts have, through a series of decisions, established a concept of military administrative due process.[94]

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[92] *Id.* at 188 (separate opinion).

[93] Crowell v. Benson, 285 U.S. 22 (1932); Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920).

[94] *See*, e.g., Davis v. Stahr, 293 F. 2d 860 (D.C. Cir. 1961); Bland v. Connally, 293 F. 2d 852 (D.C. Cir. 1961); Unglesby v. Zimny, 250 F. Supp. 714 (N.D. Cal. 1965); Clackum v. United States, 296 F. 2d 226 (Ct. Cl. 1960).

> Although it is clear that Congress, [or, parenthetically the military departments pursuant to an explicit or implicit legislative grant of authority] may set standards of military due process in view of military necessity, such standards as are set must conform to minimal requirements of constitutional due process.[96]

While the standard of due process here involved is necessarily a flexible one not susceptible of precise definition,[96] the various federal courts have established at least a penumbra of legal guidelines.

If we interpret literally the language of the court in *Unglesby* v. *Zimny*,[97] all of the procedural safeguards available to civilian respondents under federal law are applicable in military administrative proceedings except where military necessity may require otherwise.[98] It should be noted, however, that most of the other decisions in this area do not extend the due process concept as far as *Unglesby*.

1. *Procedural Ambiguity.*

As a threshold matter apart from the question of the validity of the procedures established, these decisions have required that once procedures are promulgated by the military, they be followed in each individual case.[99] It would seem, although it has apparently never been decided, that such a rule logically requires that any procedure promulgated by the military be sufficiently definitive to allow a judicial determination that it was or was not followed. The procedural guidelines for the hearing and related matters established by the *Department of Defense Directive* 1300.6 are extremely vague and it would seem an impossible task to know whether a particular objector had been afforded procedural due process thereunder.

The directive provides that an

> [A]pplicant will be afforded an opportunity to appear in person (with counsel retained by him, if he desires) before an officer in the grade of 0–3, or higher, who is knowledgeable in policies and procedures relating to conscientious objector matters.
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> *a.* After permitting the applicant to be heard in support of his application and making such other inquiry into the merits of the ap-

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[96] Unglesby v. Zimny, 250 F. Supp. 714 (N.D. Cal. 1965).

[96] An interesting and perceptive attempt to achieve such a definition in a related case may be found in Justice Frankfurter's concurring opinion in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162–63 (1951).

[97] 250 F. Supp. 714 (N.D. Cal. 1965).

[98] *Id.* at 718.

[99] Harmon v. Brucker, 355 U.S. 579 (1958); Clackum v. United States, 296 F. 2d 226 (Ct. Cl. 1960); Murray v. United States, 154 Ct. Cl. 185 (1961).

> plication as he considers appropriate, that officer will enter his recommendation and the reasons therefor into the file.[100]

This is the only language relating to the hearing aspect of the administrative procedures established by the *Department of Defense Directive.*

What is the scope of the hearing? Is the hearing officer obligated to hear or call any witness which the applicant wishes to call or is the latter restricted to presenting evidence in the form of a personal statement? Is there any obligation on the part of the hearing officer to produce or attempt to produce military witnesses desired by the applicant? May adverse witnesses be called; if so, does the applicant have a right to cross-examine them? Does the applicant have a right to all documentation relating to his case to be used by the hearing officer in making his recommendation? These are just a few of the critical questions which are engendered by the language quoted above. It would appear, that if narrowly interpreted, the hearing could be restricted by the language of the directive to a presentation by the applicant of an oral or written statement in his own behalf. If broadly interpreted, the hearing could include the presentation of witness by both sides (with the ancillary right to request the aid of the hearing officer in obtaining military witness for the applicant), cross-examination, and the right of access by the applicant to all relevant documentation. Which interpretation is to be adopted is left up to the discretion of the individual hearing officer. No reviewable standards are established. It is impossible to judge whether in a particular case, the service followed or failed to follow its established procedures and thus denied the objector due process, because no fixed standard may be defined.

Thus, in each case heard under the current directive, a claim of denial of due process may be raised. The first ground would be that the standards themselves are so vague as to preclude effective review of the question: Did the service follow its own established procedure? Or it can be argued that, regardless of what procedures were followed, the language of the directive requires more procedural safeguards than were afforded the applicant.

2. *Fair Hearing.*

The ambiguity noted above may lead to yet another problem—denial of the applicant's administrative due process right to a fair

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[100] DOD Dir. 1300.6, *supra* note 5, at § VI B . No perceptible improvement in this language may be found in the implementing service regulations, *e.g.*, Army Reg. No. 635–20 (3 Dec. 1968) [hereafter cited as AR 635–20].

hearing and related procedural rights. In 1960 the Court of Claims, in *Clackum* v. *United States*,[101] held that a full hearing, including the right to confrontation, was required in the case of a service woman who had been separated from the service with an undesirable discharge on the grounds of homosexuality. In *Bland* v. *Conally*,[102] and *Davis* v. *Stahr*,[103] the Court of Appeals for the District of Columbia took a similar position in the cases of two inactive reservists who were given less than honorable discharges. Relying on the Supreme Court's decision in *Greene* v. *McElroy*,[104] the court held that a hearing, including the right to confrontation, is a basic administrative due process right, which cannot be denied the recipient of a derogatory discharge, absent either an explicit pronouncement of the Congress or the President establishing discharge procedures which derogate such a right, or where military necessity requires such. Accordingly, while the services clearly have a right to discharge a member without a hearing through a "nonderogatory 'honorable' discharge," where the discharge may result in prejudice to the dischargee, as is the case in discharges based on conscientious objection,[105] such summary action is not permitted.

Thus if the hearing officer interprets the directive's language to permit no more than a statement by the applicant, there would be a clear violation of the latter's due process rights. Perusal of the case law in this area indicates that the courts will strike down administrative hearing procedures wherever they fail to provide a mechanism for insuring the respondent an opportunity adequately to present his case and to rebut or otherwise challenge the propriety of the Government's position.[106] It is clear that a narrow interpretation of the directive's language regarding the hearing would result in a denial of this opportunity.

D. *EQUAL PROTECTION OF THE LAWS*

A second ground for challenging the current military procedural scheme for handling in-service objectors is that it fails to accord the in-service objector equal protection of the laws. With

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[101] 296 F. 2d 226 (Ct. Cl. 1960).
[102] 293 F. 2d 852 (D.C. Cir. 1961).
[103] 293 F. 2d 860 (D.C. Cir. 1961).
[104] 360 U.S. 474 (1959).
[105] See text accompanying notes 117–23 *infra*.
[106] Greene v. McElroy, 360 U.S. 474 (1959); Clackum v. United States, 296 F. 2d 226 (Ct. Cl. 1960).

the decision in *Bolling* v. *Sharpe*,[107] the duty of enforcing the fourteenth amendment's guarantee of equal protection of the laws fell upon the Federal Government as well as the individual states. A clear violation of this standard exists with respect to the treatment of conscientious objectors under federal law. An unlawful discrimination exists between the treatment accorded the pre-service objector under the provisions of the Military Selective Service Act of 1967[108] and that accorded the in-service objector under *Department of Defense Directive* 1300.6.

1. *Procedural Safeguards Available to the Pre-Service Objector.*

After initial classification, the pre-service objector may, at his request, appear in person before a local board for a hearing. At this time he may present further information for the local draft board's consideration. Rather extensive administrative appellate procedures are provided for a registrant who feels aggrieved by the local board's classification. First, he may have his case heard by an appeals board which reviews the record compiled at the local level. If one or more members of the appeals board dissents from the classification promulgated by the board, an appeal lies to the presidential board. At each level of review the right exists to present additional information bearing upon the classification and written argument with regard thereto. Further, the possibility of reopening the issue of the classification exists at the local board level upon the presentation of new information by the registrant. At each level, the registrant is apprised of the decision rendered.[109] While the initial hearing rights afforded the pre-service objector under this statutory scheme, and those provided the in-service objector under *Department of Defense Directive* 1300.6 are comparable, the appellate procedures are not.

2. *The In-Service Objector* v. *Pre-Service Objector.*

The absence of any significant appellate procedure for the in-service objector clearly places him in a less advantageous position than his pre-service brethren. The discrimination in favor of the latter is apparent.

The concept of equal protection requires that these two classes of objectors be afforded substantially equivalent procedural safe-

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[107] 347 U.S. 497 (1954).

[108] Military Selective Service Act of 1967, 50 U.S.C. §§ 451–73 (Supp. III 1967) [hereafter cited as Sel. Service Act 1967].

[109] 32 C.F.R. §§ 1624–27 (1969).

guards, unless there is some rational basis for drawing a distinction between them.[110] The argument often advanced that such distinction necessarily follows merely because of the military status of the in-service objector clearly runs contra to the philosophy, if not the letter, of the Supreme Court's holding in *Burns* v. *Wilson*.[111] It is currently accepted law that entry upon active duty military service does not divest one of all his constitutional rights. The soldier has constitutional parity with his civilian contemporaries except in those instances where military necessity requires some degree of restriction.[112] The concept of military necessity has been utilized by courts as a rational basis for drawing discriminatory distinctions between persons in service and those without.[113]

While recognizing the validity of certain limited discriminations based upon this concept, the propriety of using such as a basis for denying the in-service objector procedural parity with the pre-service objector is questionable.

Denial of equal protection cannot be premised on the mere possibility of interference with military functions or upon the unique nature and urgent responsibilities of the military. There must in fact be some significant interference with a substantial military interest.[114]

The establishment by the Department of Defense of specific procedures for handling in-service objectors which parallel, in many regards, those provided by statute for pre-service objectors, sorely tests the credibility of an argument that military necessity prohibits according special treatment for the in-service objector. It is difficult to support the statement that recognition of them as a separate class within the military with rights comparable to those of their pre-service brethren would cause irreparable harm to a substantial military interest.

The question remains, however, whether according more procedural safeguards to the in-service objector than are now provided, to raise him to a level of parity with the pre-service objector, would impose an unbearable burden upon the efficient and ef-

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[110] Douglas v. California, 372 U.S. 353 (1963); Hoyt v. Florida, 368 U.S. 57 (1961); Griffin v. Illinois, 351 U.S. 12 (1956).

[111] 346 U.S. 137 (1953).

[112] United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967); United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960); Warren, *The Bill of Rights and the Military*, 37 N. Y. U. L. Rev. 181 (1962).

[113] Brown v. McNamara, 387 F. 2d 150 (3d Cir. 1967), *cert. denied* 390 U.S. 1005 (1968).

[114] *See* cases cited at note 112. *But see id.*

fective functioning of the military establishment. It is submitted that it would not. In recent years the Department of Defense and the individual services have established a series of procedures for handling administrative discharges which accord extensive procedural due process rights to the potential dischargee.[115] It appears that the services have been able to continue to function effectively since the advent of these procedures. The extension of numerous procedural rights to a person accused of a crime under the Uniform Code of Military Justice has also been accomplished without an undue burden on the military. Certainly the additional procedures needed to bring the in-service objector up to parity are not more burdensome than these examples.

3. *The In-Service Objector* v. *Other In-Service Dischargees.*

One final aspect of the question of denial of equal protection needs to be examined. By failing to provide the in-service objector with procedural modes akin to those provided for other service members being processed for administrative discharge under other than honorable conditions, a denial of equal protection has occurred.

The comparability of these two groups may, at first blush, seem inapposite. The in-service objector who is discharged under current regulations receives a discharge in accordance with his record of service, that is, honorable discharge or a general discharge under honorable conditions, rather than one under other than honorable conditions.[116] When we go behind the labels affixed to such discharges, we find that in effect the discharge given an in-service objector is really quite akin to a discharge under other than honorable conditions.

Two basic areas of difference exist between a discharge under honorable conditions (*i.e.*, an honorable or general discharge under honorable conditions) and those otherwise: (1) entitlement to government benefits and (2) the potential impact of the discharge upon the recipient resulting from the view taken thereof by the community to which he will be discharged.[117] The recipient of an honorable discharge or a general discharge under honorable conditions ordinarily is entitled to a panoply of government benefits administered by the Federal Government under the aegis of

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[115] Dep't of Defense Directive No. 1332.14 (20 Dec. 1965) [hereafter cited as DOD Dir. 1332.14].

[116] DOD Dir. 1300.6, *supra* note 5, at § VI C 1; *see also* AR 635–20, *supra* note 100, at ¶ 9.

[117] *See* Clackum v. United States, 296 F. 2d 226 (Ct. Cl. 1960).

the military service department of the Veterans Administration.[118] By federal statute, persons discharged from the armed services on the ground of conscientious objection, regardless of the character of their discharge, "who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority . . . "[119] are barred from receiving any of the benefits administered by the Veterans Administration.[120]

The usual rule with respect to such benefits is that the dischargee is entitled to them if his discharge was under "conditions other than dishonorable. . . ."[121] This standard does not coincide with the services' use of the term, "honorable conditions"; the latter is much more restrictive. A person receiving a bad conduct discharge or an undesirable discharge, both of which are under other than honorable conditions by service standards, may be eligible for many Veterans Administration benefits. This eligibility is based on a determination by the Veterans Administration that the underlying basis for such discharge was for a reason than one involving moral turpitude.[122]

Thus, when viewed in light of the denial of Veterans Administration benefits, the honorable or general discharge received by the in-service conscientious objector is even more detrimental to the dischargee than an undesirable discharge. Yet the procedural safeguards accorded the latter (right to counsel, full and fair hearing, right to present witnesses, etc.)[123] are not guaranteed the objector. Clearly, grounds exist for a claim of denial of equal protection.

V. RECOMMENDATIONS

Granting the shortcomings discussed above, what remedial action is available to the military services? First, it is submitted that the services should try to avoid the "bad case," the one in which the services, by a narrow interpretation of current regulations, create justiciable issues of denial of due process or equal protection of the laws. A liberal interpretation of these directives and regulations can, to a great degree, eliminate potential justiciable issues.

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[118] *See generally* 38 U.S.C. §§ 301–2101 (1964), *as amended* (Supp. III, 1967).
[119] 38 U.S.C. § 3103 (1964).
[120] *Id.*
[121] *See, e.g.*, 38 U.S.C. § 1601 (1964), *as amended (Supp* III, 1967).
[122] *See* A.D.V.A. opinions cited at 38 U.S.C.A. § 101 n. 8 (1959).
[123] *See* DOD Dir. 1332.14, *supra* note 115.

The major commands could, without doing violence to the current directives, promulgate locally applicable standard operating procedures or procedural guides establishing standards which would comport with the requirements of administrative due process. Such should include as a minimum: (1) provision of appointed counsel for the claimant, unless such is not reasonably available; (2) establishment of minimal evidentiary standards, including rules of exclusion and rules relating to burden of proof and quantum of proof; (3) provisions for both the Government and the claimant to present documentary evidence or witnesses, each side having the right to cross-examine the other's witnesses; (4) provision for both the Government and the applicant to examine the other side's documentation and witnesses prior to the hearing; and (5) provision that the claimant be informed of the decision reached at each level of consideration and the basis for such decisions.

Implicit in the procedural reforms suggested above is a procedure which is quasi adversary in nature. While this is a marked philosophical change from the approach envisioned under the current guidelines, it would appear that the change can be made without violating the terms thereof. I also feel that this approach may be in reality merely articulating an attitude which is inherent de facto in current practice, that the present procedure, rather than being an impartial fact finding situation, is really one in which the claimant tries to prove his claim meritorious to a hearing officer whose training and attitudes lead him toward the other pole. Further, this approach not only provides procedures designed to afford the applicant due process, but also provides an effective milieu for presenting and evaluating the ultimate question in the conscientious objection situation: Is the professed belief sincere? The time-proved truth-discovery method of the adversary approach is definitely better suited to this end than the non-adversary one resulting from a narrow reading of current procedural guidelines.

The foregoing suggested changes in procedure and philosophy are not innovative with respect to the service community. An examination of the *Department of Defense Directive* relating to administrative discharges [124] and the implementing service regulations [125] will reveal that procedures not unlike those recommended above are currently being utilized in administrative discharge cases. It is submitted that the procedures set forth in

[124] *Id.*

[125] *See, e.g.*, Army Reg. No. 635-212 (15 Jul. 1966).

these directives are admiraby adapted to the conscientious objector situation. Adoption of such procedures would result in administrative due process for the applicant, and at the same time, substantially reduce the possibility of creating justiciable federal due process questions which could present a court with the opportunity to strike down the services' procedures and impose undesirably rigid procedural requirements. It is further submitted that any disadvantage arising from the possibility that this recommended procedure may be more time consuming than that presently followed, is more than outweighed by the advantages just discussed. Further, the thorough, in depth examination of the material facts which characteristically features an adversarial process may in the long run save time by oviating the necessity to return cases because the file contains insufficient information on which to base a decision.

The foregoing course of action still leaves unsolved the problems arising from the writer's position that conscientious objection is something more than a mere privilege. Whether one accepts the proposition that conscientious objection is a constitutionally protected right or not, it is clear that it is not a mere privilege which may arbitrarily be granted or denied at will.[126] Yet, as noted above, the language of the *Department of Defense Directive* imports precisely that "bona fide conscientious objection will be recognized to the extent practicable and equitable." [127]

The history and case law [128] clearly support the conclusion that it is unlawful to deny arbitrarily or capriciously a claim by an in-service objector, if he can demonstrate a sincere religious belief incompatible with his status as an active duty soldier.[129]

Not only does this language create a legally unsound premise for administrative action, but it creates a philosophical stance which exacerbates the dilemma inherent in the situation of the sincere in-service objector: Should he compromise his religious precepts and endeavor to remain reasonably within the ambit of proper military conduct, trusting that the administrative procedures established by the services will provide an effective channel for achieving recognition of his claim? Or should he follow the dictates of his conscience to the letter regardless of the fact that such may result in possible violation of military law and seek recognition of his status in the judicial arena? Clearly it is to the

[126] Hammond v. Lenfest, 398 F. 2d 705 (2d Cir. 1968); Cooper v. Barker, 291 F. Supp. 952 (D. Md. 1968).
[127] DOD Dir. 1300.6, *supra* note 5 at § IV B.
[128] See cases cited at note 126.
[129] Sel. Service Act 1967.

advantage of the services to resolve the dilemma by means favoring the first alternative. The stance assumed by the Department of Defense in *Department of Defense Directive* 1300.6 is antithetical to such a resolution. The objector has no motivation to ameliorate an unyielding assertion of his objection to things military which conflict with his religious beliefs. Why should he "play the game" and utilize the available administrative procedures, when it is clear that any relief which may be forthcoming thereunder is fortuitous, being dependent not on the merit and sincerity of the objector's position, but on the whim of the executive. When faced with the choice of obeying military law and compromising a strongly held principle or obeying his conscience and thereby violating military law, the writer's experience indicates that the sincere objector generally will take the latter course of action. The threat of punishment by court-martial is no deterrent. In fact, the possibility of such punishment, including the desired end of discharge (albeit an unfavorable one), may actually prove to be an incentive of a sort to choose a course of action which will bring him into conflict with military law.

A redraft of the basic directives enunciating a policy that sincere conscientious objection falling within the terms of the Military Selective Service Act of 1967 [130] and the *Seeger* case [131] will be recognized as necessary. Whether this is done under a theory of right or as a matter of comity makes no difference. The end result will be to narrow the essential issue with respect to the in-service objector down to a question of sincerity of belief. The issue of constitutional right or mere privilege will be moot. The claimant can now have faith in the fairness of the administrative system and may well be more inclined to make minor short term compromises with his principles (*i.e.*, wear his uniform, perform non-combat related functions, etc.), while awaiting headquarters' decision on his application.

Admittedly, there are problems associated with such an approach. The first to come to mind is: What if a significant number of service members claimed to be conscientious objectors and asked to be discharged? While there is no way of insuring that such will not happen, the context of the in-service objector problem militates against such. The service member falls into two broad categories, the draftee and the enlistee. The former, if inclined to do so, has the opportunity to present any claim for exemption from military service on the grounds of conscientious ob-

[130] *Id.*
[131] United States v. Seeger, 380 U.S. 163 (1965).

jection prior to his induction.[132] It is submitted that the vast majority of those persons with strong pacifistic tendencies are weeded out by this process and never come on active duty, by virtue of their being granted an exemption or because they refuse to be inducted. Volunteering to enter active military service and strong anti-war beliefs are logically antithetical. Thus, the type of person who enters active military service is not one with a predeliction towards pacifistic feelings. These facts, plus the apparent lack of any wholesale apostasy of service members during our recent (1965–1968) period of anti-war sentiment, are indications that the problem is unlikely to become an unwieldy one.

The prospect of increased insincere claims for exemption, to avoid continued active military service, under this more liberal approach is an anticipated problem. The writer believes it to be a chimerical one. The problem of sincerity is not created by the proposed changes; it is present under the current scheme. The possibility that more unmeritorious claims may be received does not change the nature of this problem, only its potential incidence. It is submitted that the adversary procedure recommended above provides an adequately effective and efficient fact finding mechanism for making the necessary determinations of sincerity, even if the incidence should rise. A short history of successful detection of fraudulent claims, coupled with the imposition of the criminal sanctions provided for false statements under the Uniform Code of Military Justice,[133] will obviate the problem.

If the recommended amendments were made to the current directive providing for discharge upon proof of bona fide conscientious objection, the need for a new, clear and concise definition of the term, conscientious objection, becomes acute. This would be necessary not only to cure the possible constitutional defects arising under the current definition, but also to provide a workable standard to determine eligibility for discharge.

While as noted above, the logic of the position taken herein, that conscientious objection is a constitutional right, implies a broad-scope definition of what constitutes such objection, including quasi-religious and selective objectors, it is not recommended that such a breadth of scope be adopted absent definitive case law requiring it. It is believed that the majority of constitutional problems can be avoided by a definition paralleling that promulgated in the Military Selective Service Act of 1967,[134] and ex-

[132] Sel. Service Act 1967, § 456(j).
[133] 10 U.S.C. § 907 (1964).
[134] Sel. Service Act 1967, § 456(j).

panded by the *Seeger* [135] definition of religious belief. Although the writer believes that the services should adopt the broader definition, it is recognized that such action would conflict with a clear congressional policy to the contrary—that political realities and the temper of the times militate against any hope of effecting a change of this magnitude.

It is recommended that the following definition of bona fide conscientious objector be adopted: A person conscientiously opposed to war in any form by reason of religious training or belief. The term, "religious belief," as used herein, is not limited to the dogma of traditional religious sects; it includes non-theistic beliefs which occupy a place in the life of their possessor parallel to that filled by a traditional recognized religious belief. Rather than being a marked change, I believe this definition is merely a clarification of the standard currently applicable under *Department of Defense Directive* 1300.6.

The remaining problem is that of providing equal protection for the in-service objector vis-a-vis his pre-service brethren. This defect in current procedure will prove troublesome only if it is coupled with another of the defects discussed above.[136] If we can reform our procedures to prevent justiciable issues in the area of procedural due process, this defect will not itself prove fatal. The current procedure with minor modifications can, I believe, withstand judicial scrutiny. I would recommend that the claimant be provided with the opportunity to interject any relevant new matter relating to the establishment of his claim at any level in the proceedings. The claimant should also be informed of the decision at each reviewing level, and have the opportunity to rebut any adverse matter or add any relevant comments thereto.

VI. CONCLUSIONS

The current administrative scheme for dealing with in-service conscientious objectors as embodied in *Department of Defense Directive* 1300.6 does not serve well the interests of the objector or of the individual services. Grounded on a constitutionally suspect premise that conscientious objection is not a right, it predictably promulgates administrative procedures which fail to accord to the claimant objector essential administrative due process rights. He is not given a full and fair hearing and hence does not require the same protection of the laws as his pre-service objector

[135] United States v. Seeger, 380 U.S. 163 (1965).
[136] 387 F. 2d 150 (3d Cir. 1967), *cert. denied*, 390 U.S. 1005 (1968).

brethren or his fellow service member being proceesed for administrative discharge.

The specific cure for these ills is a complete revamping of the current directive, beginning with its basic premise. Only by appreciating the significance of the "distant drummer's" beat, and according recognition to all bona fide in-service conscientious objector claimants, can the service achieve an equitable, rational procedure, which will safeguard the individual's rights, aid the services to achieve an effective fighting force by properly eliminating unsuitable members, and avoid a legal confrontation which the service is destined to lose.

Failing such remedial action, the services can at least minimize potential justicable issues by according the in-service objector the same administrative procedural rights as are now granted those individuals being processed for other types of administrative discharges.

EXTRAORDINARY CONTRACTUAL ACTIONS IN FACILITATION OF THE NATIONAL DEFENSE FROM A DEPARTMENT OF DEFENSE ATTORNEY'S POINT OF VIEW*

By Major Dulaney L. O'Roark, Jr.**

The methods of adjusting contracts for the benefit of both the Government and the contractor are covered in this article. The author discusses at length the standards for evaluating requests for adjustment. In conclusion, as throughout the entire article, it is emphasized that these procedures are keyed to the needs of the Government, and that requests for adjustment must be framed accordingly.

I. INTRODUCTION

As a general proposition most Department of Defense attorneys consider questions involving procurement law to be of concern solely to specialists in that field and something which can with a little luck be avoided almost entirely. One of the best illustrations of the fallacy of this attitude is in the field of procurement law concerning extraordinary contractual actions authorized by Public Law 85–804.[1] Department of Defense[2] attorneys may reasonably expect to encounter questions concerning P.L. 85–804 whether or not their agency is primarily involved in government procurement. Furthermore, the degree of difficulty of these questions is more often greater with seemingly simple or small dollar procurements than with more sophisticated and involved procurements.[3]

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* The opinions and conclusions presented are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] 50 U.S.C. §§ 1431–35 (1964) (hereafter referred to and cited as P.L. 85–804).

[2] Hereafter referred to as DOD.

[3] P.L. 85–804 has frequently been referred to as a small business oriented law because certain of the theories for contractual adjustments ,as a practical matter, are available only to small firms. Furthermore, as a rule smaller firms are less sophisticated in terms of knowledge of defense procurement procedures and, therefore, frequently are in a position where relief in the form of extraordinary contractual action under P.L. 85–804 is the only course of action open to them if they are to recoup certain losses suffered on government contracts.

Thus, a DOD attorney whose scope of procurement practice barely extends beyond reviewing routine support services contracts (*e.g.*, refuse removal) for his agency may be confronted with situations similar to the following case which occurred a few years ago at a military installation not noted as a busy procuring activity.[4]

A contract was awarded to a local pig farmer under which the farmer was to purchase and remove all garbage generated by the installation. The contract terms were based on estimated quantities of garbage with no provision for fluctuations in quantities actually generated. As a result of the Cuban crisis in October 1962 the installation was used as a staging area and the troop strength increased from 2,100 to over 20,000 men. This in turn increased the amount of garbage the farmer was required to purchase and remove from three 55-gallon drums daily to ninety 55-gallon drums daily.

In an effort to comply with the terms of the contract the farmer purchased an additional truck, hired more personnel, and bought 681 more pigs to consume the garbage. Even with this effort about two-thirds of the garbage collected during November and December 1962 could not be consumed by the pigs and was buried by the farmer. After the crisis the troops were immediately withdrawn and as a result of the decreased amount of garbage the farmer was left with a surplus of pigs necessitating the purchase of feed or sale of the pigs in a falling market. Additionally, the farmer owed the Government $1,800 for garbage collected during November and December. The question raised for the DOD attorney by the unusual circumstance of this case is whether there is a procedure to afford contractors such as the farmer relief when within the strict interpretation of the law they have no legal remedy [5] and in the absence of some act of grace on the part of the Government [6] will, as the result of a risk

[4] Reuben Wells, Army Contract Adjustment Board (hereafter referred to as ACAB) No. 1053, 15 Apr. 1963.

[5] No legal remedy was available to the farmer to avoid the $1,800 debt because the garbage had been removed and $1,800 was due and owing the Government. Contract modification at this point in time was legally questionable since it is axiomatic that contracting officers may not waive a right vested in the Government under a contract without receiving consideration in return. Simpson v. U.S., 172 U.S. 372 (1899); 15 COMP. GEN. 25 (1935); 40 COMP. GEN. 234 (1960); 41 COMP. GEN. 436 (1962). Under the circumstances there was nothing in the way of acceptable consideration that the farmer could pass to the Government to justify a contract modification cancelling the indebtedness within traditional legal rules.

[6] Under 31 U.S.C. § 71 (1964), the General Accounting Office has authority to settle all claims and demands in which the Government is concerned,

not contemplated by either party to the contract, suffer a severe financial setback.

Stating the problem in its broadest context, government procurement in support of the national defense effort inherently exposes government contractors to dramatically changing circumstances, which frequently result in losses, because risks were not foreseen and therefore not covered in the contract. Furthermore, since numerous government agents are involved in most procurement, errors often occur when a contractor accepts instructions from a government agent who has exceeded his actual authority. This usually results in loss to the contractor because the apparent authority doctrine is not applicable to government agents [7] and, even though the Government received a direct benefit, the contractor has no legal remedy.

From the Government's point of view the urgency of procuring for national defense coupled with strict procurement regulations often create a need for extraordinary procedures to assure that supplies are delivered on time or are produced by a particular contractor with the necessary expertise. These problems arise most frequently when a vitally needed small contractor is faced with financial losses on a government contract, which threaten his continued operation. Unless relief is obtained, the Government will not receive urgently needed supplies because of either loss of the endangered contractor's special skills, or insufficient time to reprocure the supplies from another contractor.

P.L. 85–804 is intended to provide DOD with a solution to these and certain other procurement problems by allowing a flexibility in government contracting that procurement regulations and law do not permit.[8] The purpose of this article is to provide DOD at-

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either as a debtor or creditor. This authority on occasion has been used to forgive contract debts when the equities so dictated. This, however, is a slow process and as a result is not a satisfactory method of handling situations where quick action is required. *See* General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies, Title 4, Claims—General (1 Nov. 1967). Additionally, under The Federal Claims Collection Act of 1966 (80 Stat. 308), a form of grace is feasible when a contractor is indebted to the Government and it appears that no person liable on the claim has the present or prospective financial ability to pay any significant portion of the amount due, or the cost of the claim is likely to exceed the amount of recovery. *See* Armed Services Procurement Reg. (hereafter referred to and cited as ASPR), Appendix E–625 (1 Jan. 1969).

[7] *See* U.S. DEP'T OF ARMY, PAMPHLET NO. 27–153, PROCUREMENT LAW 18 (1961); R. NASH & J. CIBINIC, FEDERAL PROCUREMENT LAW 76 (2d ed. 1969).

[8] P.L. 85–804, in addition to providing for extraordinary contractual actions, also is used as authority for entering into indemnification agreements when a procurement involves nuclear or unusually hazardous risk (ASPR §

torneys operating at the Head of Procuring Activity (HPA) level[9] with a discussion of this unusual law oriented to problems that they may expect to be called upon to answer.[10] This will necessarily involve some consideration of the administration of P.L. 85–804 at higher levels but an exhaustive treatment of this aspect of P.L. 85–804 is not intended.[11] A collateral objective is to give civilian attorneys an opportunity to observe the techniques used by DOD attorneys in administering P.L. 85–804, thereby hopefully assisting them in preparing government contractors' requests for extraordinary contractual adjustment.

10–702), or to make advance payments (ASPR Appendix E–400). All other authority granted by P.L. 85–804 is contained in the so-called "Residual Powers" which is defined in ASPR § 17–300 to include all the authority under P.L. 85–804 except extraordinary contractual actions and the authority to make advance payments. This article concerns only the extraordinary contractual action aspects of P.L. 85–804. For further information concerning the other aspects, *see* Jansen, *Public Law 85–804 and Extraordinary Contractual Relief*, 55 GEO. L. J. 959, 999, 1000, 1005 (1967).

[9] Government procurement has three basic levels of responsibility: the contracting officer, who is the interface with the contractor (ASPR § 1–201.3); the Head of Procuring Activity (hereafter referred to as HPA), who is responsible for exercising certain procurement controls and making various determinations and decisions (ASPR §§ 1–201.7, 1–201.14); and the secretary of a department who has overall authority and responsibility for procurement and must make certain determinations and decisions (ASPR § 1–201.15). In delegating authority to take extraordinary contractual actions under P.L. 85–804 below the secretarial level, generally the secretaries have designated HPA's as the individuals authorized to take such actions (and in the case of the Department of the Army at least, the HPA has been authorized to redelegate this authority to his principal assistant (Army Procurement Procedure § 1–5102(vi) (1 Mar. 1969) (hereafter cited as APP)). There are some exceptions to this procedure in that certain officials not HPA's have also been delegated authority to take extraordinary contractual actions below the secretarial level. *Compare* ASPR § 1–201.14 *with* ASPR § 17–203 (b). In this article HPA will be used to refer to all officials below the secretarial level with delegated authority to take extraordinary contractual actions.

[10] Although it is intended that this article be equally applicable to all the military departments in DOD, for obvious reasons it will necessarily reflect largely Department of the Army experience. This is not altogether inappropriate since, based on available statistics, the Department of the Army in the last two years has had substantially more applications for extraordinary contractual action than the other military departments.

[11] For a brief and general discussion of P.L. 85–804, *see* GOV'T CONT. BRIEFING PAPERS, *Extraordinary Relief Under P.L. 85–804*, No. 66–3 (Jun. 1966). For a more detailed yet basically general treatment of P.L. 85–804, *see* Norris, *An Introduction to Extraordinary Contractual Actions Under 85–804*, 8 AF JAG L. REV. 15 (No. 2), Mar.—Apr. 1966, and Peirez, *Public Law 85–804 Contractual Relief for the Government Contractor*, 16 AD. L. REV. 248 (1964). The most exhaustive published work to date on P.L. 85–804 is Jansen, *Public Law 85–804 and Extraordinary Contractual Relief*, 55 GEO. L. J. 959 (1967).

II. ORGANIZATION, PROCEDURE AND BASIC CONCEPTS

A. *THE LEGAL AND REGULATORY FRAMEWORK*

P.L. 85–804 [12] authorizes extraordinary contractual actions in the following language:

> That the President may authorize any department or agency of the Government which exercises functions in connection with the national defense, acting in accordance with regulations prescribed by the President for the protection of the Government, to enter into contracts or into amendments or modifications of contracts heretofore or hereafter made . . . without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems that such action would facilitate the national defense.[13]

The President implemented P.L. 85–804 in Executive Order 10789 on 14 November 1958,[14] by authorizing the Secretary of Defense and the Army, Navy, and Air Force Secretaries (or duly authorized representatives), to take the contractual actions authorized by P.L. 85–804. Additionally, this authority was granted to the heads of various other agencies with the admonition that their implementing regulations conform to the extent practicable to those of DOD.[15]

While the provisions of P.L. 85–804 and Executive Order 10789

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[12] For an in depth review of the historical background of P.L. 85–804 and predecessor laws authorizing extraordinary contractual actions, *see* Jansen, *id.* at 960. For a briefer recapitulation, *see* Norris, *id.* at 15–17.

[13] 50 U.S.C. § 1431 (1964). P.L. 85–804 is set out in its entirety in ASPR § 17–501. By its own terms, it is operative only during a national emergency declared by Congress or the President and expires automatically six months after any such declaration is terminated. P.L. 85–804 is currently operative as a result of the state of national emergency declared by President Truman on 16 December 1950, which is still in effect (President Proclamation No. 2914, 3 C.F.R. 99 (1950)). The possibility that the authority granted by P.L. 85–804 may be withdrawn at any time by the termination of the declared state of national emergency is considered remote. Use of P.L. 85–804 over the years has confirmed the need for this law in some form as long as defense procurement remains at a high level regardless of whether a national emergency has been declared. It is, therefore, considered likely that should the present state of national emergency be terminated, P.L. 85–804 would be continued by a change in the existing law authorizing its use in times other than when a national emergency has been declared.

[14] 3 C.F.R. 426 (1958). This executive order, as amended by Exec. Order No. 11051, dated 27 Sep. 1962, 3 C.F.R. 635 (1962), is set out in its entirety in ASPR § 17–502 (1 Jan. 1969).

[15] *See* Exec. Order No. 10789, *supra* note 14, for a list of these agencies. The Department of Transportation should be added to this list as a result of P.L. 89–670 (49 U.S.C. § 1655(b)(1) (1966)), which transferred the Coast Guard to the Department of Transportation and vested all the powers that the Secretary of the Treasury had previously exercised for the Coast Guard to include the authority to take extraordinary contractual actions under P.L. 85–804, in the Secretary of the Department of Transportation.

are important, from the practicing attorney's point of view the implementing departmental regulations are the key to understanding how extraordinary contractual actions are taken. Furthermore, as a result of the requirement in Executive Order 10789 that all other executive agencies' regulations be as similar as practicable to DOD regulations, *The Armed Services Procurement Regulation* (hereafter referred to as ASPR), Section XVII, "Extraordinary Contractual Actions To Facilitate the National Defense," is the authoritative regulation to study.[16] As a practical matter, since DOD is the government agency most likely to have a need for taking extraordinary contractual action to facilitate the national defense, it will be unusual for a DOD or civilian attorney to have occasion to consult regulations other than the ASPR. Therefore, the following discussion of the key provisions of ASPR Section XVII is offered as the most authoritative description of how extraordinary contractual actions are taken under P.L. 85–804.[17]

1. *Types of Contractual Adjustments.*[18]

ASPR provides for four categories of extraordinary contractual actions. They are amendments without consideration,[19] mistakes,[20] formalization of informal commitments,[21] and other cases

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[16] The best example of another regulation implementing P.L. 85–804 is the Federal Procurement Regulation, which as a general rule applies to all federal agencies other than DOD. *See* 41 C.F.R. 1–17.2 (1968)—Requests for Contractual Adjustment.

[17] The ASPR is issued by the Assistant Secretary of Defense (Installations and Logistics) (ASPR § 1–101). The techniques used to prepare ASPR is by an inter-departmental committee consisting of a chairman, executive secretary, and two members each from the Departments of Army, Navy, Air Force, and the Defense Supply Agency (one legal and one procurement policy member from each department). The ASPR Committee is responsible for considering necessary changes to the ASPR and preparing any such changes in final form for the Assistant Secretary of Defense's approval (ASPR § 1–105). The actions of the ASPR Committee in practice are tantamount to final decision in that the Committee's recommendations are virtually always approved. For this reason any comment the ASPR Committee has made relevant to the interpretation of ASPR § XVII as reflected in Committee minutes or files is considered authoritative and will be cited when appropriate in this article. For a good discussion of the ASPR Committee's activities, *see* GOV'T CONT. BRIEFING PAPERS, *How The ASPR Is Written*, No. 67–4 (Aug. 1967).

[18] This part will only describe the kinds of extraordinary contractual actions. The standards and related factors for deciding cases will be discussed in detail in section III.

[19] ASPR § 17–204.2.

[20] ASPR § 17–204.3.

[21] ASPR § 17–204.4.

in which a Contract Adjustment Board [22] (hereafter referred to as CAB) determines that the circumstances warrant action [23] (hereafter referred to as the general powers of a CAB). The following is a brief description of each category.

Amendments without consideration may be authorized on one of two theories. The first is called essentiality and concerns those cases in which a defense contractor is threatened with a loss which will impair his productive ability. If it is determined that he is essential to the national defense for the continued performance of a particular defense contract or as a source of supply, the contract may be adjusted to provide the relief necessary to permit his continued operation.[24] This form of adjustment is predicated solely upon the Government's needs, and equitable circumstances are of no consequence. If a contractor is not essential, contractual adjustment on this theory is not available.

The second form of amendment without consideration is called government action.[25] A contractual adjustment based on this theory is designed to give relief to contractors who have suffered a loss on a government contract as a result of some unfair act of the Government. An example of such action is when the Government furnishes contractors inadequate information with which to submit a reasonable proposal.[26] Although in commercial contracts the risk of making an uninformed offer is strictly on the contractors, doing business with the Government frequently places contractors in a position where they must deal on the Government's terms or not at all. Thus, relief on the basis of Government action recognizes that circumstances may arise when fairness requires that government contractors be given more favorable contract

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[22] Contract Adjustments Boards (hereafter referred to as CAB) are boards established by the secretary of a department to function in effect as his alter ego in disposition of applications made by contractors under ASPR § XVII, Part 2. *See infra* notes 31–42 and accompanying text for a full discussion of the operation and activities of CAB's. The most active executive agency other than DOD in terms of CAB activity is the National Aeronautics and Space Administration (hereafter referred to as NASA), which for obvious reasons along with DOD has frequent procurement problems concerning the national defense. The NASA CAB (hereafter referred to as NASACAB) operates using the same principles as the DOD CAB's and, therefore, discussion of the NASACAB will be cited at various points in this article to illustrate points as appropriate.

[23] ASPR § 17–204.1.

[24] ASPR § 17–204.2(a).

[25] ASPR § 17–204.2(b).

[26] Technitrol Engineering Corporation, ACAB No. 1084, 9 Feb. 1968.

terms after a contract has been awarded, even though there is no legal obligation on the part of the Government to do so.[27]

ASPR Section 17–204.3 provides that mistakes in government contracts may be corrected and gives the following as three examples of kinds of mistakes covered by this theory:

> (i) a mistake or ambiguity which consists of the failure to express or to express clearly in a written contract the agreement as both parties understood it;
>
> (ii) a mistake on the part of the contractor which is so obvious that it was or should have been apparent to the contracting officer; and
>
> (iii) a mutual mistake as to material fact.

The underlying philosophy justifying contractual adjustment on this basis, like government action, is fairness.

Informal commitment differs from the preceding theories for contractual adjustment in that amendments without consideration and mistake cases involve a contract in existence, while informal commitment cases concern formation, after the fact, of a binding contractual agreement between the Government and a contractor who has performed services or delivered supplies without contractual coverage. Specifically, ASPR Section 17–204.4 contemplates those situations in which a contractor has relied in good faith on the apparent authority of a government agent to order performance when in fact the government agent has no actual authority to do so. Since the Government is not subject to the apparent authority doctrine,[28] these contractors are often in the position of having in good faith given the Government a direct benefit at substantial cost but are without a legal remedy.[29] In the appropriate circumstances ASPR Section 17–204.4 provides for after the fact contract formation, recognizing a legal obligation on the part of the Government to compensate such contractors.

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[27] In Technitrol, the urgency of awarding an operations and maintenance contract to be performed in Asmara, Ethiopia, resulted in the contract's being negotiated in the United States without contractors having an opportunity to visit the site of performance. As a result the contractor seriously underbid and suffered large losses. The ACAB found that considerations of fairness justified contractual adjustment.

[28] *Supra* note 7.

[29] Under the doctrine of sovereign immunity the Government is subject to suit only to the extent specifically authorized. The Tucker Act (28 U.S.C. §§ 1346(a)(2), 1491 (1958)) permits suit only in cases concerning express or implied in fact contracts. Therefore, the doctrine of quasi contract is not applicable to the Government, and contractors are without a legal remedy when they have performed services or furnished supplies without contractual coverage because neither the apparent authority or quasi contract doctrine applies to the Government. *See generally* U.S. DEP'T OF ARMY, PAMPHLET NO. 21–153, PROCUREMENT LAW 22 (1961).

The fourth category of contractual actions recognized by ASPR concerns unusual cases not within the three specifically described categories but in which a CAB under its general powers may determine that extraordinary contractual action is warranted.[30]

2. *Authority To Take Extraordinary Contractual Actions.*

The secretary[31] of each military department has exercised the authority granted to him under P.L. 85–804 to establish CAB's to function as his *alter ego* at the secretarial level[32] in authorizing, approving and directing appropriate action under the four categories of extraordinary contractual action discussed in the preceding part.[33] CAB's have the authority to make decisions, reconsi-

[30] ASPR § 17–204.1. One point of view is that such cases should be categorized as amendments without consideration along with essentiality and government action cases (*see* Jansen, *supra* note 11 at 985). This is considered an incorrect approach for two reasons. First, the concept of amendment without consideration contemplates a contract in being, *i.e.*, something to be amended. The ACAB, however, has on at least two occasions used the authority of ASPR § 17–204.1 to enter into new contracts much as formalizing an informal commitment (Giancarlo Guidi, ACAB No. 1044, 31 May 1962; Bell Aerospace Company, ACAB No. 1088, 19 Apr. 1968). Therefore, contractual adjustments pursuant to this authority may be more than amendments of existing contracts. Second, since the criterion for evaluating amendment without consideration cases differs substantially from those bearing on cases involving the general powers of a CAB, it is helpful conceptually to treat these theories separately.

[31] Secretary as used in ASPR is defined as including the secretary of a military department, the under secretary, or any assistant secretary of any military department (ASPR § 1-201.15). This definition is extremely important to the procurement lawyer because many procurement laws are couched in terms of authorizing the secretary of a department to take certain actions. There are so many such laws that as a practical matter it is imperative that more than one individual have authority to administer and make decisions under them. For this reason, unless the authorizing statute specifically restricts the exercise of authority, secretary is given the broad definition used in ASPR.

[32] Secretarial level "means an official at or above the level of an Assistant Secretary or his deputy, and a Contract Adjustment Board established by the Secretary concerned" (ASPR § 17–104).

[33] ASPR §§ 17–201, 17–202. This has been accomplished via a series of delegations which is illustrated by the following delegation procedure used by the Department of Army. The Secretary of the Army delegated the authority granted to him by Executive Order No. 10789, *supra* note 14, to the Assistant Secretary of the Army (Installations and Logistics) (*see* Gen. Order No. 10, Hq. Dep't of Army (1 Apr. 1961)). The Assistant Secretary established the ACAB by directive dated 5 January 1959; then in 1961 redelegated overall responsibility for administering P.L. 85–804 and supervision of the ACAB to the Deputy Assistant Secretary of the Army (Installations and Logistics) (hereafter referred to as the Deputy ASA(I&L)). As a result the Deputy ASA(I&L) is the principal official at the Department of the Army secretarial level responsible for extraordinary contractual actions as well as for other aspects of P.L. 85–804. In this article the terms secretary and secretarial level will be used but in fact will refer to the

der such decisions on reapplication, adopt their own procedures, and otherwise perform all acts necessary to accomplish their function.[34] ASPR provides that CAB's may consist of a chairman and not less than two nor more than six other members. A majority of the appointed members constitutes a quorum for any purpose and the concurring vote of a majority of the total CAB constitutes an action of the CAB.[35] At the present time the Army CAB (hereafter referred to as ACAB) consists of a chairman, six members, one of whom functions as recorder, and a non-voting counsel. The Navy CAB (hereafter referred to as NCAB) has a chairman and three members, one of whom serves as recorder. The Air Force CAB (hereafter referred to as AFCAB) has a chairman and six members, one of whom functions as recorder and counsel. Procedures of the CAB's are similar to many other administrative boards in that they are highly informal with no rules of evidence and hearings are non-adversary in nature.[36] Hearings are held in Washinton, D.C., at which time applicants are permitted to present their cases in as much detail as desired.[37] Decisions of a CAB are reflected in a Memorandum of Decision, which is normally written in a sequence consisting of facts of the case, applicants' theory or theories on which action is justified, discussion, and decision of the CAB to include contractual action authorized.[38] These decisions, when favorable, may authorize whatever contractual modification is deemed appropriate to accomplish the decision of the CAB.[39] Usually, favorable modifica-

official at the secretarial level to whom the secretaries of the military departments have delegated authority to administer P.L. 85–804 for their department.

[34] ASPR § 17–202.2.

[35] ASPR § 17–202.1.

[36] *E.g.*, the ACAB rules of procedures specifically provide that "there will be no inflexible procedure for the consideration of matters referred to this Board for disposition." Army Contract Adjustment Board Rules of Procedure, Rule II, paragraph 2 (5 Jan. 1959).

[37] The addresses of the military CAB's are as follows: ACAB—Office of the Army Contract Adjustments, Office of the Assistant Secretary of the Army (Installations and Logistics), Department of the Army, Room 2E 569, Pentagon, Washington, D.C. 20310; Air Force CAB (hereafter referred to as AFCAB)—SAFGC, Department of the Air Force, Room 4C 942, Pentagon, Washington, D.C. 20330; Navy CAB (hereafter referred to as NCAB)—ONM, Department of the Navy, Room 2223 Main Navy, Washington, D.C. 20360.

[38] Consistent with the Freedom of Information Act (5 U.S.C. § 552 (1964)), CAB decisions are available to the public upon request and compliance with applicable departmental regulations covering such matters as charges for duplicating material.

[39] ASPR § 17–202.2. These decisions, however, cannot authorize actions specifically precluded by ASPR § 17–205. The Comptroller General has

tions merely provide for an increase in unit price;[40] on occasion, however, more complicated arrangements are made, whereby prompt payment discount provisions of a contract are nullified, thus entitling the contractor to amounts withheld pursuant to such clauses.[41] Still another technique of accomplishing a CAB's decision is to change the type of contract from firm fixed price to a cost reimbursement type.[42]

The Secretaries of the military departments have made a second delegation of their authority under P.L. 85–804, authorizing HPA's and a few other specially designated officials to take extraordinary contractual actions below the secretarial level within certain limitations.[43] An HPA has authority to deny any request for contractual adjustment.[44] He may take favorable extraordinary contractual actions in mistake and informal commitment cases, but not in amendment without consideration cases.[45] ASPR Section 17–205.2 further restricts the scope of an HPA's authority. He may not take action that will obligate the Government in excess of $50,000, release a contractor from performance of an obligation priced in excess of $50,000, or result in increased cost to the Government in excess of $50,000 if reprocurement is contemplated. Additionally, in mistake cases the HPA may not authorize an extraordinary contractual action which will increase the contract price above the next lowest responsive bidder in formally advertised procurement, or next lowest responsive offeror in nego-

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ruled that statutes which prohibit the expenditures of funds may not be disregarded under P.L. 85–804 on the basis that statutory limitations on expenditures are not laws related to the laws on making, performance, modifications, or amendment of contracts contemplated by P.L. 85–804 (21 COMP. GEN. 835 (1942); Ms. Comp. Gen. B–158896, 6 May 1966). Additionally, P.L. 85–804 may not be used to disregard civil service laws, laws concerning compensation of government employees, or the hiring of experts or consultants (32 COMP. GEN. 18 (1952)). It should be noted that decisions of the Comptroller General and the courts prior to the passage of P.L. 85–804 in 1958 refer to the various statutes which contained essentially the same provisions as P.L. 85–804 in force at the time of those decisions. Pre-1958 decisions are, therefore, considered valid authority for interpretation of P.L. 85–804 insofar as they address provisions of earlier laws that were adopted in P.L. 85–804.

[40] Campeau Tool and Die Company, ACAB No. 1085, 23 Jan. 1968.

[41] Telectro-Mek, Inc., ACAB No. 1090, 8 Mar. 1968.

[42] Doughboy Industries, Inc., ACAB No. 1089, 23 Feb. 1968. For an explanation of the distinction between fixed price and cost contracts as used in government procurement, *see* ASPR §§ 3–404, 3–405, and *infra* notes 109 and 110.

[43] ASPR § 17–203. *See supra* note 9.

[44] ASPR § 17–203(a)(i).

[45] ASPR § 17–203(a)(ii).

tiated procurement,[46] or in an amount in excess of $1,000, unless notice of the mistake was received by the contracting officer prior to final payment.

Procedures for handling cases at the HPA level usually consist of normal staff action, which involves investigation by the contracting officer, consideration by interested staff elements, and final decision by the HPA. Some HPA's have established local contract adjustment boards to hear cases much as secretarial level CAB's do. The HPA then acts upon findings and recommendations received from such boards. When final action is taken on a request for contractual adjustment below the secretarial level, the HPA signs a Memorandum of Decision supporting either a denial or the contractual adjustment authorized.[47] As with CAB decisions, most favorable HPA decisions authorize contract price increases in an amount necessary to offset losses incurred by the contractor.

Certain general limitations are expressed in ASPR which restrict the authority of both CAB's and HPA's to take extraordinary contractual actions. P.L. 85–804 may not be used to authorize cost-plus-a-percentage-of-cost contracting,[48] enter contracts in violation of existing law relating to limitation of profit or fees,[49] procure by negotiation property or services required by law to be procured by formal advertising,[50] or waive certain bonds required by law.[51] Additionally, certain conditions must be met before either a CAB or HPA may adjust or enter a contract by authority of P.L. 85–804. These include a mandatory finding that the intended contractual action will facilitate the national defense,[52] that within the department concerned there is either no other legal authority available with which to deal with the circumstances giving rise to the request for contractual adjustment or that such authority is inadequate under the circumstances,[53]

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[46] Formally advertised procurement means procurement by competitive sealed bids and award to the lowest responsive responsible bidder. ASPR § 2–101. Negotiated procurement involves price solicitation from the maximum number of qualified sources, followed by negotiations between the responsible government agents and those contractors within a competitive range. ASPR § 3–101.

[47] ASPR § 17–208.2.

[48] ASPR § 17–205.1(a) (i).

[49] ASPR § 17–205.1(a) (ii).

[50] ASPR § 17–205.1(a) (iii).

[51] ASPR § 17–205.1(a) (iv).

[52] ASPR § 17–205.1(b) (i).

[53] ASPR § 17–205.1(b) (ii). This condition has been compared to the administrative law concept of exhaustion of administrative remedies before access to the courts may be obtained. This approach is misleading because

that the request for application was filed before all obligations under the contract have been discharged,[54] and in informal commitment cases that the request for payment was received within six months after the contractor acted in reliance upon the commitment and that it was impracticable to use normal procurement procedures at the time the commitment was made.[55] Finally, contractual adjustments are limited in that they may not exceed the amounts appropriated for procurement and the statutory contract authorization.[56]

3. *Submission of Requests by Contractors.*

ASPR provides that any contractor[57] seeking an adjustment under P.L. 85–804 may file a request with the contracting officer or his duly authorized representative.[58] In the event it is impractical to follow these instructions, ASPR § 17–207.1(i)–(vi) provides a list of officials for each department to whom requests may be sent and be considered properly submitted. ASPR § 17–207.2 contains general instructions for the content and form in which requests should be submitted.[59]

After a request has been submitted it will be processed as described in the preceding part and may be finally disposed of at the

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it connotes that unsuccessful efforts before other administrative agencies within a department, *e.g.*, the Armed Services Board of Contract Appeals (hereafter referred to as ASBCA), may in effect be appealed to a CAB for reconsideration. The proper interpretation is that P.L. 85–804 is intended to be a gap filler, not an appeals procedure. Therefore, if an administrative procedure is available in terms of jurisdiction and time for processing a case, P.L. 85–804 is not applicable even though a contractor is unsuccessful using the other procedure. *See* Frost Engineering Development Corp., ACAB No. 1096, 6 Jan. 1969, in which the ACAB ruled that so much of the contractor's request related to matters previously considered by the ASBCA were finally settled and would not be reconsidered by the ACAB.

[54] ASPR § 17–205.1(c)(i).

[55] ASPR § 17–205.1(d).

[56] ASPR § 17–205.1(b)(iii).

[57] While it is not expressly provided in P.L. 85–804 or ASPR that subcontractors performing for prime government contractors may apply for extraordinary contractual action, both the legislative history of P.L. 85–804 and practice by the CAB's firmly establish that they may do so either through the prime contractor or on their own initiative. *See, e.g.*, S. REP. No. 2281, 55th Cong., 2d Sess. 3 (1958); Fidelitone Microwave, Inc., ACAB No. 1098, 17 Apr. 1969.

[58] ASPR § 17–207.1. This is interpreted to mean, in cases such as informal commitment where there is no contract in existence, the contracting officer or duly authorized representative who would have procured the supplies or services had they been properly ordered.

[59] *E.g.*, request should cover the precise adjustment desired, the essential facts in narrative form, the rationale supporting a favorable decision, and other pertinent matters.

HPA level by a Memorandum of Decision either denying the request or authorizing appropriate contractual adjustment.[60] In the event the HPA concludes that action beyond his jurisdiction is appropriate (usually because he desires to approve a request for more than $50,000 or one involving an amendment without consideration), or that the case is doubtful or unusual he is authorized to submit the request to his department's CAB.[61]

Notwithstanding the clear provisions of ASPR, contractors frequently attempt to submit cases directly to a CAB. While such irregular submissions do not prejudice a contractor, they accomplish very little. It is standard practice for CAB's to forward any requests received directly from contractors to the appropriate contracting officer for processing in accordance with ASPR. Thus, contractors are well advised in the interest of time, if for no other reason, to submit all requests for extraordinary contractual action directly to the appropriate contracting officer as prescribed in ASPR.

B. *BASIC CONCEPTS TO BE USED IN EVALUATING REQUESTS FOR CONTRACTUAL ADJUSTMENT*

Section III will deal in depth with the standards for deciding requests for extraordinary contractual action. Prior to this, however, it is necessary to consider some fundamental aspects of the purpose, nature and significance of extraordinary contractual actions as authorized by P.L. 85–804.

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[60] ASPR § 17–208.2(a). Finality of an HPA's decision is one of the most confused areas in the administration of P.L. 85–804. ASPR implies that an HPA's decision is final and contains no provisions for appeal to a CAB. However, on a few occasions CAB's have reconsidered a case which has been the subject of a "final" HPA decision. (In ACF Industries, Inc. (AFCAB, 5 Apr. 1967), the AFCAB simply noted in its decision that the contractor had appealed this case directly by letter addressed to the Air Force Contract Adjustment Board. In Jaragua S. A. (ACAB No. 1087, 10 Apr. 1968), the Assistant Secretary of the Army (Installations and Logistics) authorized the ACAB to review an HPA's decision.) Good arguments may be made both for the need of an appeal procedure from HPA decisions and the counter position that the existing limitations on an HPA's authority adequately protect contractors and, therefore, finality at the HPA level is justified. Until the ASPR is changed, however, the better view is considered to be that HPA decisions should be treated as final to the maximum intent possible, and review of HPA decisions should be made at the Secretarial level (probably by the Department's CAB) only when the HPA decision in question is manifestly arbitrary and unreasonable to the point of frustrating the purpose of P.L. 85–804.

[61] ASPR § 17–203(a)(iii).

1. *Meaning of "Facilitation of the National Defense."*

ASPR requires that prior to taking any contractual action under authority of P.L. 85–804 a finding must be made that the action will facilitate the national defense.[62] Logically this finding should involve a determination that the national defense effort has been tangibly and directly enhanced by the extraordinary contractual action taken. In practice, however, this apparent test for facilitation of the national defense is not always used. The reason for this apparent inconsistency is best shown by the following extracts from the House and Senate Reports prepared when P.L. 85–804 was being considered by Congress. The *House Report* contained the following explanation of how P.L. 85–804 was intended to facilitate the national defense:

> This broad power is designed to provide the flexibility required by the Government to deal with the variety of situations which will inevitably arise in a multi-billion-dollar defense program and for which other statute authority is inadequate. By providing means for dealing expeditiously and fairly with contractors, the enactment of this bill will help assure that vital military projects will proceed without the interruptions generated by misunderstandings, ambiguities, and temporary financial difficulties.[63]

A letter from DOD appended to the *Senate Report* supporting passage of P.L. 85–804 explained why the law would facilitate the national defenses as follows:

> When procurement is large scale, as is the case today and in the foreseeable future, there will, despite careful procedures, inevitably be some mistakes by the Government and contractors in making contracts and some failures on both sides to formalize agreements. . . .
>
> The proposed bill would enable the military departments to deal with these individual situations expeditiously, fairly, and without interruption of contract performance. Moreover, the authority sought will be of general value to the whole procurement program because of the assurance it gives all contractors that, if these difficulties arise, they will be promptly handled. Many of these adjustments are accomplished by overseas commands with foreign contractors. These are important in maintaining the prestige of the United States and in preserving amicable relations with friendly countries. Domestically, many of the adjustments have been made with small business concerns participating in the defense effort.[64]

In practice the purpose of P.L. 85–804, as shown by this legislative history, has resulted in what may be called an objective and subjective test for deciding whether granting a particular request for contractual adjustment will facilitate the national defense. In situations in which the basis for the request is error, mistake, ambiguity, or misunderstanding, the basic issue is fair-

[62] ASPR § 17–205.1(b)(i).
[63] H.R. REP. No. 2232, 85th Cong., 2d Sess. 4 (1958).
[64] S. REP. No. 2281, 85th Cong., 2d Sess. 8 (1958).

ness or equity. As contemplated by Congress, such cases may be adjusted pursuant to P.L. 85–804, because by being fair to individual contractors (usually by giving him an increase in contract price or formalizing an informal commitment), other contractors will know they too will be treated fairly, and the overall defense program will thereby be improved. Therefore, even though the result of a favorable decision in such cases benefits the contractor directly, while the Government receives no more tangible benefit than that already legally required by the contract, the overall national defense effort has been facilitated. For this reason ASPR, in describing the standards for deciding cases of amendments without consideration involving government action,[65] mistakes,[66] and informal commitments,[67] establishes fairness and expeditious treatment of contractors as the objective test for determining whether adjustment of a given contract will facilitate the national defense.[68]

The question of facilitation of the national defense becomes subjective, however, when the request for contractual adjustment is for an amendment without consideration because of essentiality of the contractor to the national defense. In such cases there is no issue of fairness, only the fact that if some action is not taken to assist the contractor the Government will not receive supplies or services essential to the national defense. In these circumstances the requirement that the national defense be facilitated by the proposed contractual adjustment takes on its more logical meaning, *i.e.*, that the contractor is producing or can produce critical supplies or is furnishing or can furnish important services which directly impact the national defense.[69]

[65] ASPR § 17–204.2(b).
[66] ASPR § 17–204.3.
[67] ASPR § 17–204.4.
[68] It should be noted that ASPR specifically contemplates cases in which the circumstances of a request for contractual adjustment contains all the factors normally necessary to decide that contractual adjustment is appropriate, but other factors or considerations in a particular case may warrant denial of the request. ASPR § 17–204.1. Thus, while it is generally proper to describe fairness as an objective standard for determining that an adjustment will facilitate the national defense in government action, mistake, and informal commitment cases, even in such cases the determination is not completely automatic in that the circumstances of each case must be evaluated for unusual considerations negating the conclusion that fairness will facilitate the national defense. For example, in a mistake case the NCAB denied part of a request for adjustment because it concerned matters which were the basis for a federal antitrust suit which had been filed against the contractor (Westinghouse Electric Corp., NCAB, 22 Nov. 1961).
[69] ASPR § 17–204.2(a) permits adjustment when a contractor is essential to the national defense either for the supplies or services called for in the contract to be adjusted, or as a source of supply for future requirements.

2. *The Nature of a Request for Contractual Adjustment.*

A common misunderstanding of many lawyers dealing with P.L. 85–804 for the first time is to consider a request for contractual adjustment to be in the nature of a claim, *i.e.*, a demand for money from the Government as a matter of right on the part of the contractor.[70] That this is emphatically not the case has been pointed out in several decisions, emanating from various legal authorities and most recently and succinctly restated by the Comptroller General as follows:

> It is well settled that the remedial provisions of the First War Powers Act (which were, as above pointed out, substantially the same as those in Public Law 85–804) were not adopted for the benefit of contractors, or for the purpose of relieving them from unprofitable contracts, but solely for the benefit of the nation as a whole, in order to facilitate the prosecution of the war. See *Atlantic Corporation* v. *United States*, 125 Ct. Cl. 464; *Bolinders Company, Inc.* v. *United States*, 139 Ct. Cl. 677, certiorari denied 355 U.S. 953. These provisions conferred no rights on any contractor, and the determination as to whether or not an amendment to a contract benefiting the contractor would facilitate the prosecution of the war, or the national defense, is committed to the sole discretion of the President and his delegates. *Bolinders Company, Inc., supra; Commonwealth Engineering Co.* v. *United States*, 148 Ct. Cl. 330, certiorari denied 364 U.S. 620; *Evans Reamer & Machines Co.* v. *United States*, 181 Ct. Cl. 539, certiorari denied 390 U.S. 982.
>
> The grant of relief to a contractor under the law here involved is thus clearly a matter of grace, to be allowed or denied at the discretion of the designated officials, and the Courts have accordingly recognized the right of those officials to measure the relief granted solely by the needs of the national interest without reference to the adequacy of such relief to save a contractor from all prospective losses. See *Theobald Industries, Inc.* v. *United States*, 126 Ct. Cl. 517; *Bolinders Company, Inc.* v. *United States, supra; Evans Reamer & Machine Co.* v. *United States, supra.*[71]

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[70] The term "claim" has a variety of meanings as it relates to claims against the Government. Typically to military lawyers it connotes claims made against the Government under the various laws and regulations authorizing claims for loss or damage to personal property by military members, foreign claims, tort claims and the like. (*See* 31 U.S.C. §§ 240–243 (1965 Supp.); 10 U.S.C. § 2734 (1964); 28 U.S.C. §§ 2671–2680 (1964). *See also* Army Reg. No. 27–20 (19 Aug. 1969); Army Reg. No. 27–28 (20 May 1966); Army Reg. No. 27–22 (18 Jan. 1967).) In a procurement context it relates to any contract claim a contractor or the Government might make under the terms and conditions of a contract. (*See* ASPR Appendix E–605.) It is intended in this part to make it clear that a request for contractual adjustment under P.L. 85–804 is not a claim in any sense that the foregoing citations contemplate. The closest P.L. 85–804 has come to constituting a type of claims remedy occurred as a result of U.S. Army activities in the Dominican Republic in 1965 in which property taken from Dominican citizens for use in fortifications, etc., was paid for under the provisions of P.L. 85–804. These exceptional circumstances are treated separately later in this article. *See infra* notes 234–241 and accompanying text.

[71] Ms. Comp. Gen. B–163274, 20 Dec. 1968.

Once this underlying philosophy is recognized, it becomes clear why it is erroneous to consider P.L. 85–804 as yet another remedy available to contractors who have a dispute with the Government over contract interpretation, administration, or performance. Even though the results of many contract adjustments "feel" like a remedy to contractors (especially in adjustments made to correct unfair treatment by the Government), this does not alter the crucial point that such adjustments are made because it is in the best interest of the Government to authorize the contract change.

This rationale has also been used to clarify the relationship of governmental officials with contractors who desire a contractual adjustment, but are unsure whether P.L. 85–804 applies to their cases or of the procedure for submitting a request for adjustment. As a result of contractors seeking help from government officials on these points, the question arose whether it was a violation of the law prohibiting officials and employees of the Government from assisting in claims against the Government [72] for government officials to furnish guidance to contractors desiring to submit a request for contractual adjustment under P.L. 85–804. In an opinion of the Army Judge Advocate General, this question was answered as follows:

> If granting relief to a contractor under Public Law 85–804 will facilitate the national defense, then a fortiori, the national defense is also facilitated by providing appropriate assistance to contractors in their attempts to point out instances in which the national defense can or will be facilitated by the Government taking appropriate action (such as granting relief to the contractor). Consequently, it is the opinion of this office that contracting officers, or other procurement personnel, furnishing guidance to contractors concerning the submission of a request for relief under Public Law 85–804 are acting in the best interest of the United States and in the proper discharge of their official duties and that, therefore, such action does not come within the prohibition of the referenced statute. [18 U.S.C. § 283] [73]

The opinion concluded with the statement that the degree of assistance to contractors depended on the circumstances of each case. Such assistance, however, may include an explanation of the substantive and procedural provisions of ASPR Section XVII, and any other available information or suggestions to contractors concerning the method of submitting a request.[74]

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[72] 18 U.S.C. § 283 (1964).

[73] JAGT 1961/6130, 19 Jun. 1961.

[74] An extension of this principle is illustrated by the practice of CAB's routinely evaluating the facts supporting a request for contractual adjustment for a basis for authorizing contractual adjustment other than the one on which the request was submitted after the CAB has found that basis inadequate.

3. *The Significance of CAB Decisions.*

Prior to discussing the standards used to evaluate requests for contractual adjustments it is important briefly to note the nature of CAB decisions and the legal method or practice that is used in the preparation of such decisions. The DOD CAB's generally take the approach that each request for contractual adjustment is unique, and therefore previous decisions concerning similar cases are not *stare decisis* for the request under consideration.[75] This view properly takes into consideration the point that the interest of the Government changes and what may have been in the best interest of the Government only a few years ago may not be so today. Additionally, this approach recognizes that the authority granted by P.L. 85–804 is an instrument of defense procurement policy for the benefit of the Government, and not a claim or remedial procedure for the benefit of contractors.[76] Thus, it is fair to say that the authority granted by P.L. 85–804 to take extraordinary contractual actions actually expands and contracts with the times, as opposed to being continuously refined as a result of CAB decisions and secretarial actions. For this reason, the citation of CAB decisions in this article must be taken as an illustration of what has been done in the past and not as a representation that under similar circumstances the same decision would be made today.[77] Nevertheless, CAB decisions are helpful vehicles in exploring the parameters of the authority to take extraordinary contractual actions and, as a policy indicator rather than legal precedent, are helpful to both the civilian attorney preparing a request for adjustment for his contractor client and the DOD attorney in evaluating the merits of such a request. They will be cited only for that purpose throughout this article.[78]

[75] This is the express policy of the ACAB and is the apparent policy of the AFCAB and NCAB as shown by the lack of citation of previous decisions as precedent in decisions made by those CAB's. The recently constituted Transportation Contract Adjustment Board (hereafter referred to as TCAB), which handles requests for extraordinary contractual adjustments for the Coast Guard (*supra* note 15), has taken an altogether different approach in its single decision to date by copiously citing CAB decisions and other legal authority. *See* The American Ship Building Company, TCAB No. 85–804–3, 12 Nov. 1968.

[76] *Supra* note 71 and accompanying text.

[77] This point can be too strongly made, however, in the context of routine informal commitment and mistake cases where presumably as long as there is authority to make contractual adjustments on the basis of fairness, the interest of the Government will always require contractual adjustment to provide relief in those circumstances. Thus, CAB decisions in this sort of case are generally consistent and, therefore, more reliable.

[78] Consistent with the view that the application of P.L. 85–804 varies to some degree with the times, the most recent decisions of the CAB's

Notwithstanding the preceding emphasis on the policy as opposed to legal implications of CAB decisions, it would be misleading not to point out that lawyers play a significant role in the administration of P.L. 85–804 in DOD,[79] and as a result typical legal method is frequently employed in preparation for CAB hearings and used in hearings and during deliberations. What has been done in the past is considered, although not treated as binding. Concern is shown that there be reasonable uniformity in the application of the principles of P.L. 85–804, and that contractors be treated fairly, not only within the spirit and intent of P.L. 85–804, but also within the accepted rules of administrative due process.[80] Therefore, it may reasonably be said that the operations of a CAB represent the interface between the legal and policy considerations inherent in operating the defense procurement system.

III. STANDARDS FOR EVALUATING REQUESTS FOR EXTRAORDINARY CONTRACTUAL ACTION

This section will deal with the four theories of contractual adjustments described in ASPR Section 17–204 which are amendments without consideration, mistakes, informal commitments, and the general powers of a CAB. It is important to keep in mind

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(primarily within the last three years) will be used as much as possible as illustrations. ACAB decisions will be cited most frequently because in the last three years the ACAB has received substantially more applications for contractual adjustment than the other CAB's. It should be noted that decisions of TCAB and NASACAB are cited in this article in addition to DOD CAB's when decisions of those CAB's are pertinent to a point being developed.

[79] *E.g.*, the ACAB has two attorneys working in their legal capacity on the Board. Two other members on the ACAB at this time have legal training.

[80] Administrative due process concerns the body of administrative law dealing with treatment of private individuals by the federal executive departments under the rules and regulations promulgated by those departments. Specifically at issue is the question of the authority of the various departments to vary from their own regulations in dealing with particular cases, or, stated conversely, whether departmental regulations bestow rights on the individual following them in his dealings with a department. The general rule is that if a departmental regulation provides a substantial safeguard or benefit to the individual challenging noncompliance with a regulation, the department is not free to ignore that regulation. In the context of P.L. 85–804 it is important to recognize that while contractors have no vested right under either the law or the ASPR to require contractual adjustment (*supra* note 71 and accompanying text), as a matter of administrative due process contractors have the right to submit requests for contractual adjustments and have these requests considered fairly under the rules promulgated in ASPR. *See generally* U.S. DEP'T OF ARMY, PAMPHLET No. 27–187, MILITARY AFFAIRS, para. 3.4 (1966).

that an HPA may authorize contractual adjustments only in mistake and informal commitment cases not involving more than $50,000.[81] This, however, does not reduce the need for a thorough understanding by HPA's of the standard for evaluating cases based on other theories. This is true because of the HPA's authority to deny any request for contractual adjustment, regardless of theory or amount,[82] and his responsibility for recognizing cases beyond the scope of his authority which require or should receive CAB consideration.

A. *AMENDMENTS WITHOUT CONSIDERATION*

Amendments without consideration are of two types, those based on the essentiality of the contractor to the national defense,[83] and those based on government action causing the contractor to suffer a loss on a defense contract.[84] The following discussion will pinpoint the elements of each type and illustrate with CAB decisions the technique used in evaluating requests for adjustments based on this theory.

1. *Essentiality to the National Defense.*

A contractor may request a contractual adjustment when his operations are endangered by financial losses on a defense contract if he is essential to the national defense. ASPR establishes the standard for essentiality in the following language:

> Where an actual or threatened loss under a defense contract, however caused, will impair the productive ability of a contractor whose continued performance on any defense contract or whose continued operation as a source of supply is found to be essential to the national defense, the contract may be adjusted but only to the extent necessary to avoid such impairment to the contractor's productive ability.[85]

Essentiality as described in this paragraph contains four main factors. They are:

(1) Whether there is an actual or threatened loss on a defense contract;

(2) Whether the actual or potential loss, however caused, will impair the productive ability of the contractor;

(3) Whether the contractor is essential to the national defense for either:

(a) continued performance on any defense contract; or

[81] *See* ASPR §§ 17-201(a), 17-203(a)(ii), 17-205.2(ii) & (iii).
[82] ASPR § 17-203(a)(i).
[83] ASPR § 17-204.2(a).
[84] ASPR § 17-204.2(b).
[85] ASPR § 17-204.2(a).

(b) as a source of supply for future procurements; and

(4) Whether contractual adjustment will facilitate the national defense.[86]

The following is an analysis of each of these factors.

a. Whether there is an actual or threatened loss on a defense contract. This element requires identification of the defense contract being performed by the contractor, and from an accounting point of view a determination whether a loss actually or potentially exists on any such contract. This is often a relatively simple question because a request for adjustment normally concerns a defense contract on which the contractor is currently performing or attempting to perform and the facts submitted in support of the request establish a demonstrable loss. Thus, in *Siltronics, Inc.*[87] evidence was submitted which showed that the contractor had experienced great difficulty in meeting the "flatness and squareness" requirements of the specifications of a defense contract for electronic equipment housing. As a result labor and material costs had skyrocketed causing the contractor to suffer an obvious substantial loss.[88]

Occasionally, while it is clear that a contractor has suffered a loss in his overall operations, it is not clear that his defense contracts are the reason for any or all such losses. For example, in *Memcor, Inc.*[89] the contractor, whose primary business was the performance of defense contracts, in his request for contractual adjustment alleged overall corporate losses without specifically identifying which defense contracts were the loss contracts. The ACAB in granting an adjustment on the basis of essentiality was apparently satisfied that a showing of overall corporate loss by a

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[86] ASPR § 17–205.1(b)(i). This element is implicit in each theory and, although not specifically required in ASPR § 17–204.2, whether the adjustment will facilitate the national defense is one of the factors in amendment without consideration cases. Furthermore, facilitation of the national defense should be distinguished from the procedural limitations that bear on requests for adjustment (*e.g.*, that other legal authority within the department concerned be lacking or inadequate before action under P.L. 85–804 may be taken (ASPR § 17–205.1(b)(ii)). Facilitation of the national defense is a substantive question which must be affirmatively addressed in every case along with the other substantive elements of a particular theory for contractual adjustment.

[87] ACAB No. 1083, 17 Mar. 1967.

[88] In Parsons Corp., AFCAB, 24 Feb. 1965, the contractor had difficulty finding a resin which would successfully bind compressor blades together. The contractor proved a loss on the contract by comparing total costs and expenses with the contract price.

[89] ACAB No. 1080, 12 Sep. 1966.

contractor primarily engaged in defense work adequately satisfied the requirement that there be a loss on a defense contract.

The ACAB's approach in not being overly technical in looking for the precise amount and derivation of a loss on a defense contract is considered sound particularly in view of the fact that contractual adjustments on the basis of essentiality are made because they best serve the interest of the Government by assuring that vital supplies are delivered on time.[90] Similarly, CAB's have found loss on defense contracts when the alleged losses are to some unknown extent the cumulative effect of losses on earlier defense contracts[91] and when losses on a defense contract were found to be unrealistic because the contractor's accounting system appeared to spread losses from his commercial operations to his defense contracts.[92] These cases demonstrate that, regardless of potentially complicating factors such as those discussed above, if the overall purposes of authorizing adjustments in essentiality cases are served, HPA's and CAB's are well within the law in applying liberally the requirement that a loss or threatened loss on a defense contract be shown.[93]

An important administrative aspect bearing on the evaluation of the "loss on a defense contract" requirement is that frequently contractors have defense contracts with more than one military

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[90] In further support of this approach is the fact that ASPR § 17–204.2(a) provides that the cause of the contractor's loss in terms of fault is irrelevant in essentiality cases. This is the best illustration of the emphasis of this theory on the needs of the Government and not as relief for the contractor. It follows that should a contractor be essential to the defense effort, the fact that his accounting system or the circumstances in general do not permit precision in attributing losses to specific contracts will not preclude contractual adjustment.

[91] In Trad Electronic Corp., AFCAB, 6 Feb. 1959, and NCAB, 6 Feb. 1959, it was noted that the contractor's present state of insolvency was in part attributable to losses on earlier defense contracts.

[92] In Doughboy Industries, Inc., ACAB No. 1089, 23 Feb. 1968, the defense contract was charged with significant amounts of overhead costs in a period in which work on the defense contract was virtually at a standstill, and the corporation was suffering heavy losses on both its defense and commercial work. Nevertheless, some loss on the defense contract was identifiable and the ACAB had no trouble in finding that the loss requirement had been met.

[93] It is arguable that a vitally needed contractor could receive an adjustment on the basis of his essentiality to the national defense even though he is totally unable to relate his losses to defense contracts but is in danger of going out of business from losses on his commercial operations. This is true because CAB's under their general powers are not restricted to authorizing contractual adjustments only in cases that fit the specific examples of theories for adjustment contained in ASPR § 17–204.1. Therefore, a CAB could authorize an adjustment in circumstances in which loss on a defense contract could not be shown.

department, all of which may be in jeopardy. It is vitally important that any other department which may have a contract with the contractor requesting adjustment because of essentiality be advised so that a coordinated DOD action may be taken.[94] In practice there have been occasions when a request for adjustment received by one department to whom the contractor was determined not to be essential was referred to another department to whom the contractor was essential,[95] and when joint or coordinated essentiality decisions have been made by two CAB's.[96]

A related question involving the need to identify the defense contract on which the loss was suffered concerns which defense contract may be adjusted, once it is determined that a request is meritorious. The language in ASPR describing essentiality seems to restrict the defense contract which may be adjusted to the contract on which the loss was or will be suffered. In typical requests for adjustment on the basis of essentiality this interpretation of the regulation poses no problems, since the defense contract on which the loss was or is being suffered is current and one on which the contractor is attempting to perform. It is possible, however, that the defense contract on which the loss was suffered is completely executed and all obligations under the contract have been discharged. In this situation there has been a loss on a defense contract; but as a result of the restriction that no contract may be adjusted if all obligations under it have been discharged, it would seem that the contract could not be adjusted and the contractor could not be helped.[97] The solution to this apparent dilemma, as well as in any other essentiality case in which it is desirable to adjust a contract other than the loss contract, is that a CAB may authorize any appropriate action deemed necessary to

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[94] ASPR § 17-208.6(a) & (c).

[95] In National Radio Co. Inc., AFCAB, 19 Jun. 1968, the contractor was denied relief because he was not essential to the Department of the Air Force; as a result of interdepartmental coordination by the AFCAB, however, it was learned that the contractor was essential to the Department of the Navy in the performance of contracts for the Navy. The request file and an audit report were then forwarded to the Department of the Navy for consideration.

[96] The ACAB and NCAB made companion decisions in the request of Memcor, Inc., after both Boards determined that Memcor was essential to the national defense. Memcor, Inc., ACAB No. 1080, 12 Sep. 1966; NCAB, 4 Jan. 1967. Had the NCAB not been willing to cooperate, the favorable decision of the ACAB would have been largely ineffectual. *See also* Central Technology, Inc., AFCAB, 14 Oct. 1966, and NASACAB, 25 Oct. 1966.

[97] ASPR § 17-205.1(c)(i) specifically precludes adjustment if all obligations under the contract have been discharged.

accomplish the purpose of its decisions.[98] For this reason, a CAB is not precluded from entering a new contract or adjusting contracts other than the loss contract if this is the most desirable method of accomplishing the Government's requirements. Thus, in essentiality cases any contractual adjustment or formation not exceeding the general restrictions placed on the exercise of the authority granted in P.L. 85–804 is legally permissible.[99]

b. Whether the actual or potential loss will impair the productive ability of the contractor. In many essentiality cases the question of impairment to the contractor's productive ability as a result of loss on a defense contract is plainly answered by the fact that the contractor is on the verge of ceasing operations. In *Astronetic Research, Inc.*,[100] the contractor showed impairment of productive ability because his financial situation had deteriorated to the point that his plant had been closed and his employees dismissed. In *Siltronics, Inc.*,[101] the ACAB was furnished financial data which showed that by all reasonable standards, the contractor was bankrupt and as a result the contractor had been precluded from obtaining financial assistance from other sources. Similarly, in *Telectro-Mek, Inc.*,[102] the contractor's financial situation was such that creditors were on the verge of forcing him into involuntary bankruptcy unless past due accounts were settled.

Impairment of productive ability may also be established in situations short of those in which the contractor is faced with closing his plant. In *Central Technology, Inc.*,[103] impairment was found when the contractor showed that as a result of improvident bidding on several defense contracts when he first started doing business his financial position was such that his productive ability to complete current defense contracts on schedule was endangered. No claim was made that insolvency was imminent or that all production would cease without assistance. In *Doughboy Industries, Inc.*,[104] the impairment was established by showing that the division of the corporation performing defense contracts was experiencing severe losses to the point that the financial structure of the whole corporation was endangered. To restore the corporation to some degree of stability and to satisfy creditors the contractor had either to close the division doing defense work or to

[98] ASPR § 17–202.2.
[99] *See generally* ASPR § 17–205.
[100] NCAB, 24 Dec. 1964.
[101] ACAB No. 1083, 17 Mar. 1967.
[102] ACAB No. 1090, 8 Mar. 1968.
[103] AFCAB, 14 Oct. 1966.
[104] ACAB No. 1089, 23 Feb. 1968.

obtain financial assistance from the Government. Even though the contractor was not faced with the prospect of total collapse, the ACAB was satisfied that losses had impaired the contractor's productive ability to the degree necessary to justify contractual adjustment.

On other occasions, in spite of a showing that a loss had been suffered by the contractor, insufficient impairment was found. In *Quinn Construction Co.*,[105] the NASACAB found that although the contractor had demonstrated that it suffered a loss on the contract involved in its request for relief, the profit and loss data and statement of assets and liabilities submitted did not reveal symptoms of insolvency or other indications that the contractor's continued operation was endangered. In *The American Ship Building Company* [106] case, the TCAB concluded that although the contractor had suffered substantial losses on the defense contract (in excess of nine million dollars), there was no evidence that the contractor was in serious financial trouble and that the largest part of the loss had already been absorbed by the overall business of the company. On this basis it was concluded that the productive ability of the contractor had not been impaired. (This case is a particularly good example of why it is nearly impossible for a business of any size to receive a contractual adjustment on the theory of essentiality. As a rule such companies can absorb huge losses without productive ability being substantially impaired. This in part accounts for the view that the essentiality theory is small business oriented.)

From these decisions it can be seen that an evaluation of impairment to productive ability must be made on the unique facts of each case. As a general rule it is an accounting exercise with the primary indicator being whether the contractor is insolvent or on the verge of insolvency. In cases in which the contractor is clearly not insolvent the issue is closer and the primary concern is whether the contractor will of economic necessity default on his defense contracts, or intolerable delays in performance will result from a slowdown in production because of the contractor's poor financial position. The most difficult cases are those in which a loss on a defense contract is found, but because of the contractor's overall financial position his productive ability may have been reduced but not impaired. In these situations the contractor cannot qualify for contractual adjustment on the basis of essentiality.

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[105] NASACAB, 28 Nov. 1967.
[106] TCAB, 12 Nov. 1968.

The issue of impairment to productive ability has significance in a second respect in that, unlike the question whether there has been a loss on a defense contract, the degree of impairment to productive ability must be ascertained with some specificity. This is necessary because ASPR provides that when a contract is adjusted on the basis of essentiality, this adjustment may be only in an amount required to restore the impairment to productive ability and may not compensate the contractor for losses over and above this amount.[107] This requirement frequently poses the most difficult problem a CAB faces in structuring a decision designed to give assistance to a contractor determined essential. The best example of this is the situation which confronted the ACAB in *Doughboy Industries, Inc.*[108] In this case one of the contractor's divisions was performing defense work under a fixed price contract [109] and suffering substantial losses. Simultaneously, other divisions were incurring losses on commercial operations. Although it was easy enough for the contractor to show how his productive ability in the division performing the defense contract was impaired, it appeared that losses not incurred in that division were also being assigned to it as a result of the type of accounting system used by the contractor. To assure that the Government was not relieving the contractor from losses on his commercial operations which had no relation to the amount necessary to restore productive ability in the division performing the defense contracts, the ACAB converted the contract from a fixed price contract to a cost contract with cost ceilings.[110] By this method the contractor was permitted to recoup most of his losses on the defense contract (based on government audit) and the impairment to his productive ability was obviated.

In conclusion it must be recognized that precision in determining the amount of adjustment necessary to restore productive ability is virtually impossible. As illustrated by *Doughboy Industries, Inc.*, the adjustment decided upon must be responsive to the circumstances of the particular case and with the degree of cer-

[107] ASPR § 17–204.2(a).

[108] ACAB No. 1089, 23 Feb. 1968.

[109] Fixed price contracts are priced on the basis of a set or firm price to be paid the contractor regardless of his actual cost. By more efficient production a contractor can increase profits on such a contract, or conversely a less efficient or unfortunate contractor may lose money should he be unable to produce at the contract price or less. *See* ASPR § 3404 for a discussion of fixed price contracts as used by DOD.

[110] Cost contracts permit a contractor to be paid his allowable cost in performing the contract usually plus a fixed fee. *See* ASPR § 3–405 for a discussion of cost contracts as used by DOD.

tainty possible restore the impaired productive ability of the contractor. Under this pragmatic approach productive ability has been restored by a simple contract price increase,[111] increasing payments to a prime contractor so that he may in turn increase payments to his subcontractor determined to be essential to the national defense,[112] eliminating a discount provision from the contract [113] and extending delivery schedules.[114]

c. Whether the contractor is essential to the national defense for continued performance of any defense contract or as a source of supply for future procurements. One of the ironies of making a request for contractual adjustment on an essentiality theory is that a contractor can only assert his essentiality to the national defense but has for all practical purposes no way of affirmatively proving it. This is true because only the Government is in a position to determine whether, in fact, a particular contractor or contract is essential to the defense effort. Thus, a contractor must rely on the department to whom he submitted his request to ascertain from its operations and supply elements the exact status and need for the supplies the contractor is either producing or could produce.

The normal procedure which should be followed by an HPA in evaluating whether a contractor is essential is to determine from his point of view the need for the contractor. Should it be decided that the contractor is essential, the HPA should include a detailed explanation of the reasons supporting this determination when forwarding the request to his department's CAB. Furthermore, should the HPA have information indicating that other departments have an interest in the contractor, this information should be included in the file. If the HPA determines that the contractor is not essential, he has the authority to deny the request. Care should be taken, however, to assure that other departments do not have an interest in the contractor before denying a request. If there is the least question on this point, HPA's should bring the

[111] Dayton Aviation & Radio Equipment Corp., NCAB, 29 Dec. 1967.

[112] Central Technology, Inc., AFCAB, 14 Oct. 1966.

[113] Telectro-Mek, Inc., ACAB No. 1090, 8 Mar. 1968.

[114] It should be noted that there is no correlation between the amount required to restore impaired productive ability and profit that the contractor hoped to make on his loss defense contracts. For this reason, one point of view is that profit is not permitted in a contractual adjustment based on essentiality. The better view is believed to be that anticipated profit has no bearing on what is required to restore impaired productive ability and, therefore, any discussion of profit in essentiality cases is irrelevant.

matter to the attention of their department's CAB for a decision whether interdepartmental coordination is appropriate.

The CAB decisions reveal that there are four interrelated factors bearing on a contractor's essentiality to the national defense. They are the nature of the supplies the contractor is producing either on a particular contract or his overall product line, economic considerations from the Government point of view, timing in the sense of availability of other suppliers and how soon they can begin deliveries, and any special urgency bearing on the Government's requirements resulting from the current international situation. It is important to note that a request may contain varying degrees of each of these factors and in some cases all of the factors may not be present. The fact that all are not or that one factor is predominant is not the test for deciding the merits of a request.[115] The following discussion of recent CAB decisions is intended to illustrate this point by showing the technique used by the CAB's when considering the issue of essentiality.

A typical example of a CAB determination in which a contractor was found essential, as well as a good illustration of the impact of the international situation on such determinations, is the decision in *Telectro-Mek, Inc.*[116] Here the contractor was producing a relatively simple communications control set for radios used in armored vehicles. The evidence showed that should the contractor go out of business there would be a delay of approximately four months before new suppliers could begin deliveries. The majority of the sets which the contractor could produce during that period were scheduled to be used on armored vehicles in South Vietnam. Under this set of circumstances the ACAB found that a relatively brief delay in deliveries of an unsophisticated

[115] Considerable concern has been shown by some writers whether monetary savings to the Government standing alone constitute a sufficient basis for finding a contractor essential. (This question usually arises when it would be more costly to default the endangered contractor and reprocure than to increase the contract price sufficiently to permit the contractor to complete performance.) No CAB within the last three years has found essentiality on that basis and it is believed that money savings alone is not and should not be an adequate basis for finding a contractor essential. The underlying concept of P.L. 85–804 is to provide the Government a means to take extraordinary contractual actions in unusual circumstances requiring prompt actions. It would be naive to say that monetary considerations have no bearing on essentiality; nevertheless, if all that can be shown is that it is cheaper to adjust a contract than to reprocure, essentiality as contemplated by P.L. 85–804 has not been shown. *But see* GOV'T CONT. BRIEFING PAPERS, EXTRAORDINARY RELIEF UNDER P. L. 85–804, No. 66–3, June 1966; Jansen, *Public Law 85–804 and Extraordinary Contractual Relief*, 55 GEO. L. J. 959, 975 (1967).

[116] ACAB No. 1090, 8 Mar. 1968.

piece of equipment was intolerable. Therefore, a request which might well have been denied under other circumstances was found to merit a contractual adjustment on the basis of essentiality. It is important to note that there was little the contractor could have done to prove this point. The ACAB called upon various agencies of the Department of the Army to furnish the necessary expertise in reaching its decision.

In other situations the sophisticated nature of the supplies and corresponding delay in reprocurement is the predominant factor. In *Doughboy Industries, Inc.*,[117] the endangered contractor was the only current producer of intricate electronics equipment required to meet safety standards for Army airfields and to train pilots. The evidence showed that should the contractor go out of business, a delay in reprocurement from 12–16 months would result. Since the need for the electronics equipment was urgent, this delay was intolerable and, therefore, the contractor was determined essential.[118]

Dayton Aviation & Radio Equipment Corp.[119] is the best recent case containing all four factors considered in making determinations of essentiality. The contractor was producing a new low frequency radio receiving set to be introduced into the Navy fleet communications system. The NCAB was advised by the Naval Electronics Systems Command that the early introduction of the new equipment was essential. Other evidence showed that a delay of several months would occur in finding a new supplier, with further delay as a result of production "start-up" time necessary for that supplier. This delay was considered by operations personnel to be too long in view of the urgent need for the equipment. Although not specifically set out in the decision, it is assumed from the date of the decision (20 December 1967) at least some of this urgency was attributable to operations of the fleet in waters off Southeast Asia. Finally, the NCAB had evidence before it, showing that by enabling the present contractor to deliver under the existing contract, almost one million dollars could be saved over the cost of reprocuring the equipment from another source.[120] With this overwhelming fact situation, the NCAB un-

[117] ACAB No. 1089, 23 Feb. 1968.

[118] In Parsons Corp., AFCAB, 24 Feb. 1965, the contractor was shown to be the original manufacturer and only known source capable of overhauling a type of helicopter blade used on helicopters involved in Air Force rescue. For this and other reasons involving delay on other Air Force procurement programs the contractor was determined essential.

[119] NCAB, 29 Dec. 1967.

[120] The contractor also had been the recipient of a government loan and had received payment for work performed to date on the contract

derstandably determined that the contractor was essential to the national defense.

The cases in which essentiality has not been found have involved circumstances where the government operations and supply personnel have advised that the contractor was not essential,[121] where the CAB had information showing that the type equipment produced by the contractor was being replaced by newer equipment,[122] and where the contract on which the request for relief was based was completed and there was no immediate need for the contractor's services.[123] In some instances, contractors who have received a contractual adjustment on the basis of essentiality have subsequently requested additional relief on the same basis, only to learn that they are no longer considered essential. Thus, Telectro-Mek, Inc., after having received a contractual adjustment on essentiality, applied a few months later for a further adjustment on the same basis. In the time between the first adjustment and the second request for adjustment, new suppliers had gone into production, and the requirements of the Department of the Army were capable of being satisfactorily met by these new producers. For this reason the ACAB found that Telectro-Mek, Inc., was no longer essential to the national defense and denied the request.[124]

A final point to consider concerning essentiality is that ASPR contemplates two separate situations in which essentiality may exist. They are when the contractor is essential as a source of supply and when he is essential for the continued production of a particular contract. Review of CAB decisions shows, however, that the great majority of authorized contractual adjustments on the basis of essentiality have been predicated on the need for the continued performance of a particular defense contract or contracts.[125] In those relatively few decisions in which the contractor was found essential as a source of supply he could have been found essential simultaneously for the continued performance of defense contracts he was currently performing. The best example of this is the decision in *Central Technology, Inc.*[126] Here

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together, totaling approximately one million dollars. If the contractor went out of business, it was likely that most, if not all, of this amount also would be lost.

[121] Consolidated Airborne Systems, Inc., NCAB, 25 Mar. 1960.

[122] Fargo Shipping Corp., NCAB, 5 Feb. 1968.

[123] Quinn Construction Co., NASACAB, 28 Nov. 1967.

[124] Telectro-Mek, Inc., ACAB No. 1094, 23 Oct. 1968.

[125] *E.g.*, Doughboy Industries, Inc., ACAB No. 1089, 23 Feb. 1968; Telectro-Mek, Inc., ACAB No. 1090, 8 Mar. 1968.

[126] AFCAB, 14 Oct. 1966; NASACAB, 25 Oct. 1966.

it was found that the contractor was essential as a source of supply because his product line included a variety of ordnance devices used in the manufacture of equipment for programs of NASA and the military departments. Additionally, it was pointed out that the contractor was particularly essential for the timely delivery of infrared flares to the Air Force pursuant to an existing contract. Thus, the contractor could have been found essential either for the continued performance of a particular contract or in the alternative as a source of supply.

d. Whether contractual adjustment will facilitate the national defense. As previously discussed the question whether a contractual adjustment will facilitate the national defense in essentiality cases is subjective.[127] It is necessary, therefore, to determine that the requested contractual adjustment will directly enhance an existing or planned defense program. Failure to make the adjustment will, conversely, delay or impede any such defense programs beyond tolerable limits. While conceptually it is important to think of facilitation of the national defense as a separate consideration in essentiality cases, in fact, this determination is inherently part of the inquiry when ascertaining whether a contractor is essential. Thus, if after consideration of the factors that bear on essentiality, a contractor is determined essential for the performance of a particular contract or as a source of supply, it necessarily follows that a contractual adjustment will directly facilitate the national defense.

2. *Government Action.*

Government action is the most illusive extraordinary contractual action theory to define. One writer describes it as a situation in which the Government has taken some action that causes harm to contractors for which the Government is not legally liable.[128] While this definition is accurate as far as it goes, it ignores the point that contractual adjustments pursuant to P.L. 85–804 may be made as a result of acts of the Government when other legal authority in the department concerned is lacking or inadequate.[129] For this reason, should the Government incur legal liability by committing an act amounting to breach of contract, an act for which no legal authority exists in the executive departments to resolve, the contractor could request contractual adjustment

[127] *Supra* note 69 and accompanying text.
[128] GOV'T CONT. BRIEFING PAPERS, *Extraordinary Relief Under P.L. 85–804*, No. 66–3, June 1966.
[129] ASPR § 17–205.1(b)(ii).

under P.L. 85–804 in lieu of bringing suit.[130] Another writer explains government action as an act which interferes with contract performance.[131] This approach to government action is helpful but vague. As will be seen, many of the contractual adjustments authorized on the basis of government action do involve some act of the Government which is a direct physical impediment to contract performance. Others, however, only indirectly interfere with performance in that the harm done to the contractor results from an unfair decision of the contracting officer which does not physically impede performance but increases cost of performance for which the contractor cannot be compensated. Still other government acts have no impact on performance, but result in loss to the contractor, such as when an inappropriate clause is included in a contract.

As a result of the difficulty in defining government action, it is best to think of it generally as a theory which recognizes that when the government acts in its sovereign capacity, and in the administration of contracts under complicated rules and regulations, inevitably some acts will be committed by the Government which work an injustice on contractors. This approach correctly emphasizes overall government activity in its relations with contractors as the thrust of the government action theory, and removes the danger of overconcern with the categorization of government action in terms of specific kinds of acts of government agents.

ASPR establishes amendment without consideration on the basis of government action in the following language:

> Where a contractor suffers a loss (not merely a diminution of anticipated profits) on a defense contract as a result of Government action, the character of the Government action will generally determine whether any adjustment in the contract will be made and its extent. Where the Government action is directed primarily at the contractor and is taken by the Government in its capacity as the other contracting party, the contract may be adjusted if fairness so

[130] The reason this point has not resulted in more requests for adjustments under P.L. 85–804 is because of the disputes clause used in defense contracts (*e.g.*, ASPR § 7–103.12). This clause operates to require defense contractors to appeal "questions of fact" arising under the contract to the ASBCA (*see* ASPR § 1–314). Since this appeal procedure is relatively inexpensive and speedy, and due to the ASBCA's tendency to take a liberal view of its jurisdiction, virtually all disputes between the DOD and its contractors are initially considered by the ASBCA even though they often involve breach of contract. This procedure has worked to the benefit of both contractors and DOD, and CAB's will, therefore, only in unusual cases consider a request for adjustment involving circumstances which could be considered by the ASBCA.

[131] Jansen, *Public Law 85–804 and Extraordinary Contractual Relief*, 55 GEO. L. J. 959, 980 (1967).

> requires; thus, where such Government action, although not creating any liability on its part, increases the cost of performance, considerations of fairness may make appropriate some adjustment in the contract.[132]

In evaluating a request for adjustment based on this paragraph, four factors must be considered:

(1) Whether the Government in either its sovereign or contractual capacity;

(2) committed an act resulting in unfairness to the contractor;

(3) which caused the contractor to suffer a loss; and

(4) whether under the circumstances considerations of fairness justify a determination that it will facilitate the national defense to adjust the contract.

The following is an analysis of each of these factors.

a. Sovereign and contractual capacity of the Government distinguished. Although the word "sovereign" is not used by ASPR in describing government action, the interpretation given to the regulation is that it contemplates two types of government actions which may be unfair to a contractor. The first of these are acts taken by the Government in its sovereign capacity.[133] Sovereign acts are generally defined as acts of the Government which are public and general in nature and as such cannot be held to alter, modify, obstruct, or violate particular contracts which the Government has entered with private contractors.[134] Examples of government acts which are considered to be public and general in nature, and for which the Government is not legally liable in the event individual government contractors are adversely affected, are when the Government places controls over critical materials,[136] when the Government condemns property, and when military orders obstruct performance of a government contract.[137]

The second type of government acts contemplated by the regulation are taken by the Government in its contractual capacity. What is intended here, unlike sovereign acts, is ascertainable

[132] ASPR § 17-204.2(b).

[133] AMCOR, Inc., ACAB No. 1081, 12 Sep. 1967, contains the following language: "Accordingly, in considering requests for relief under Public Law 85-804 on the basis of Government action, it is necessary to determine whether the Government's action was taken in its sovereign or in its contracting capacity." (*Id.* at 3.)

[134] Horowitz v. U.S., 267 U.S. 458 (1924).

[135] Gothwaite v. U.S., 102 Ct. Cl. 400 (1944).

[136] Wah Chang Corp. v. U.S., 282 F.2d 728 (Ct. Cl. 1960).

[137] Froemming Bros. v. U.S., 108 Ct. Cl. 193 (1947).

from the express words of ASPR which describe such action as those acts which are directed primarily at the contractor and are taken by the government in its capacity as the other contracting party. While this language appears to contemplate acts by the Government only after a formal contract has been executed between the Government and the contractor, acts by government agents prior to contract award have been found to be those of the Government in its contractual capacity.[138] For this reason, when evaluating a government action case involving acts of the Government in its contractual capacity, it is necessary to consider any acts by government agents in the procurement process bearing on a particular contract, either before or after award of the contract.

b. Whether a government act resulting in unfairness to the contractor has been committed. In evaluating a request based on government action for unfairness, it is first necessary to determine whether the government act was in its sovereign capacity or in its contractual capacity. As the following discussion will show, the likelihood of a request for contractual adjustment being granted will depend to a large extent on which type of government act is involved.

The most frequent cases giving rise to a request for contractual adjustment involving sovereign acts have concerned federal laws increasing minimum wages. The decision of the ACAB in *AMCOR, Inc.*[139] is typical of the manner in which such cases have been handled. Here it was determined that federal legislation increasing the minimum wage was of general and public application and, therefore, a sovereign act. It was then pointed out that relief from the effect of such acts generally is not granted by P.L. 85–804 and that exceptions to this rule depend on the character of the act and the effect upon the contractor considered along with all other facts of the case. The ACAB found no unusual circumstances which justified an exception to the general rule and denied the request.[140]

In *Fargo Shipping Corp.*[141] the contractor alleged that actions

[138] In Technitrol Engineering Corp., ACAB No. 1084, 9 Feb. 1968, failure of the Government to provide potential contractors with sufficient information with which to make an informed offer was considered an act of the Government in its contractual capacity.

[139] ACAB No. 1081, 12 Sep. 1967.

[140] This same basic fact situation has most recently been considered in Cheeks Maintenance Service Co., Inc., ACAB No. 1092, 19 Mar. 1969, and decided identically.

[141] NCAB, 5 Feb. 1968.

of DOD in controlling ports in Vietnam and in directing contractor vessels so that scheduling was difficult and operation inefficient caused increased cost in the performance of a government contract. Since this control was exercised as part of the military operation in Vietnam, the NCAB had no difficult in deciding that the alleged government actions were not directed primarily at the contractor and were not taken by the Government in its capacity as the other contracting party. For this reason no government action supporting a contractual adjustment was found, *i.e.*, a sovereign act standing alone did not justify contractual adjustment.

These two cases are representative of the nature of requests for contractual adjustment involving sovereign acts and demonstrate the fact that, with one exception, CAB's have refused to authorize contractual adjustments when the alleged government act was a sovereign act. The only known decision authorizing a contractual adjustment in which a sovereign act was involved is *Atlas Coverall and Uniform Supply Co.*[142] Here the solicitation for a supply contract contained an estimate of the total supplies that would be required under the contract. It was expressly stated, however, that the specified quantities were only estimates and did not bind the Government to purchase such quantities. The Government actually ordered less than 21 percent of the estimated quantities. The AFCAB found that the large disparity between actual purchases, and estimated purchases occurred because of administrative delay on the part of the Government in awarding the contract which operated to shorten the period of the contract, and the fact that operations of the air base where the contract was to be performed were phased down during the period for contract performance. The AFCAB did not label this case as government action or in any other way identify the theory under which the contractual adjustment was authorized. The basis for the decision was simply that, while the Air Force had no legal obligation under the contract to purchase more supplies than it had, relief was appropriate when deviations from estimated quantities to be purchased exceeded reasonable expectations. Notwithstanding the AFCAB's failure to identify the theory under which the adjustment was authorized, it seems clear that the circumstances relied upon to show why the contractor was unfairly treated were government acts. Furthermore, the act of closing a military installation must be considered a sovereign act, because the purpose of closing or opening an installation is public and general in nature; hence it is not an act of the Government in its contractual capac-

[142] AFCAB, 22 May 1967.

ity. Therefore, it is concluded that the contractor in this case received a contractual adjustment in part as the result of an act of the Government in its sovereign capacity.

The fact that only one contractual adjustment has been authorized on the basis of a government act in its sovereign capacity has not gone unnoticed. At one point efforts to revise ASPR to remove any distinction between sovereign and contractual acts of the Government were made with the intent of relaxing the strict interpretation being given to ASPR in deciding requests for adjustment involving sovereign acts. The ASPR Committee, however, was of the opinion that a change for this purpose was unnecessary because the ASPR as presently written did not preclude a CAB from authorizing contractual adjustments in the cases involving a sovereign act of the Government.[143] This decision of the ASPR Committee, while recognizing that a sovereign act could be a basis for contractual adjustment, did nothing to clarify when a sovereign act might justify contractual adjustment under P.L. 85–804. It is, therefore, considered likely that contractual adjustment based on an act of the Government in its sovereign capacity will remain largely theoretical.

Government action in its contractual capacity has not received as rigid an interpretation as sovereign acts and, as a result, there are numerous decisions of CAB's which have authorized contractual adjustment when such an act was found. The following is a discussion of some of the more recent of these decisions.

In *Technitrol Engineering Corp.*[144] the contractor suffered a loss on a services contract for the maintenance and operation of a U.S. power plant at Kagnew Station in Ethiopia. The ACAB found that because of delay by government procurement personnel at Kagnew Station it was not learned until almost time for performance to begin that there were no contractors located anywhere near the power plant who could perform the services. As a result hurried negotiations were conducted with contractors in the United States and a contract awarded even though the successful contractor had never seen the power plant he was to maintain and operate. Not surprisingly the contractor experienced immediate difficulty in performance and suffered losses. In granting the contractor's request for adjustment it was found that the urgency of the procurement, the geographical remoteness of the power plant, and the extremely general performance specifications furnished by Kagnew Station resulted in the Govern-

[143] ASPR Comm. Minutes, 8 Nov. 1961.
[144] ACAB No. 1084, 9 Feb. 1968.

ment's providing contractors with information inadequate to allow an informed offer to be made. The ACAB found this sequence of events to be government action in its contractual capacity, which unfairly caused the contractor to suffer losses.

In *Dyco, Inc.*[145] the contractor had been awarded a requirements contract,[146] under which he was to operate a base service station and a base motor pool, and was to perform maintenance on government vehicles. The contractor had prepared his bid for the vehicle maintenance portion of the contract on the basis of estimated hours of work furnished by the Government. As in most requirements contracts, the Government was not obligated to order the estimated quantities. Prior to award the contracting officer learned that the estimated hours of vehicle maintenance work had been overstated by 100 percent. Despite his knowledge of this error, the contracting officer awarded the contract without informing the contractor of the error. As a result the contractor significantly underbid the maintenance portion of the contract and suffered a loss on that portion of the contract of $36,132. The AFCAB found that the Government's failure to inform the contractor of the error in the estimated quantities was an act which caused the contractor to suffer a loss unfairly and, therefore, authorized contractual adjustment.

The NCAB considered the significance, in *Perkin-Elmer Corp.*,[147] of the Government's including an inappropriate clause in a contract. In this case the Navy contract contained an agreement with the contractor that if the contractor proposed improvements to the film reel assemblies being procured, which resulted in cost savings to the Government, he would share in such savings.[148] Specifically, the contract provided that the contractor would receive a royalty over a two-year period on all film reels subsequently purchased for Navy use. After the completion of this contract, on which the contractor did propose improvements resulting in cost savings, the Navy stopped procuring film reels and thereafter obtained them through the Defense Supply Agency, which procured the reels centrally for all military departments.

[145] AFCAB, 11 Dec. 1968.

[146] Requirements contracts permit the Government to order requirements for supplies or services as they arise during a specified contract period usually at a firm price. An estimated total quantity expected to be ordered under the contract is stated for the information of contractors in preparing their offers. As a rule the Government has no obligation to order any of the supplies or services, or only a minimum amount. *See* ASPR § 3-409.2.

[147] NCAB, 20 Oct. 1967.

[148] Such proposals are called "Value Engineering." *See* ASPR § 1-1701.

The contractor attempted to obtain the royalty owed pursuant to the Navy contract on later contracts with the Defense Supply Agency, but that agency refused to accept the royalty charge. The contractor then requested the Navy to adjust the original contract under P.L. 85–804. In considering this request the NCAB found that the contracting officer should have known that future purchases of film reels for Navy use were not likely to be made under Navy contracts, and that the royalty agreement would, therefore, not permit the contractor to share in savings by the Navy on future purchases. Rather the contract should have contained a cost savings clause, providing for a one time lump sum payment to the contractor. The NCAB concluded that fairness required that this oversight be corrected and authorized an adjustment of the contract.

Other recent cases involving government action in its contractual capacity have concerned situations in which the contracting officer failed to include the correct minimum wage scale in the solicitation, causing the contractor to underbid;[149] where the Government gave contractors only a short time to bid and failed adequately to set forth the requirements for use of a specific material for backfill in a construction project; [150] where an amendment to a contract requiring an extension of the contract delivery schedule took into account increased direct cost, but failed to compensate the contractor for the effect of the extended delivery schedule on overhead costs;[151] and where government agents exerted pressure to have a communications system operable in an unreasonably short time, causing the contractor to incur additional costs.[152]

The main point to be gained from these cases is that government action in its contractual capacity takes many forms. Therefore, the best approach in evaluating a request submitted on this theory is to examine broadly the Government's relationship with the contractor to determine any potential unfairness to him without looking for particular kinds of government acts which "automatically" are unfair.

c. Whether the government act caused the contractor to suffer a loss on a defense contract. ASPR authorizes contractual adjustment on the basis of government action "where a contractor suffers a loss (not merely a diminution of anticipated profits) on a defense contract. . . ." [153] This language has caused more confu-

[149] Vanell Painting Co., ACAB No. 1086, 24 Jan. 1968.
[150] Midland Constructors, ACAB No. 1078, 8 Mar. 1967.
[151] Ling Temco Vought, Inc., NASACAB, 3 Aug. 1965.
[152] Canadian National Railways, AFCAB, 25 Aug. 1965.
[153] ASPR § 17–204.2(b).

sion than any other in Section XVII of ASPR and probably has resulted in requests for adjustment being improperly denied. This misunderstanding is the result of the two meanings that can be given to this requirement. The first is that the government action must cause an overall net loss on a contract before an adjustment may be authorized. If the government action only reduces profit, adjustment is not authorized because this has merely diminished anticipated profits. The contrary view is that if the government act caused the contractor to make less money than he would have made, he is entitled in fairness to recoup this amount whether or not he suffered an overall loss on the contract.

The ASPR Committee considered clarification of this language but found it unnecessary to do so because, in the opinion of the Committee, the present language does not require a loss as a condition precedent to relief based on government action in either its sovereign or contractual capacity.[154] Thus, a contractual adjustment could be authorized which results in a contractor's recouping lost profit as well as net losses in government action cases.

In practice the CAB's have not been clear in the handling of this question. Most decisions do not contain sufficient detail to identify whether or not lost profits are being compensated. In a recent ACAB decision, however, a contractor was given a contractual adjustment which specifically provided for payment of profit as well as increased cost when, as a result of government action, he was forced to hire additional employees to perform a services contract.[155] The AFCAB has authorized a contractual adjustment which compensated a contractor for losses suffered on a portion of a contract (but no profit on that portion), which resulted in the contractor's realizing an overall small profit on the total contract.[156] Finally, the NCAB has authorized payment to a contractor as a result of government action without even discussing the decision whether a loss was suffered on the contract.[157]

Regardless of the somewhat confusing status of the decisions, it is believed that the ASPR Committee's action confirms that the intent of allowing contractual adjustments on the basis of government action is to pay a contractor for any loss realized by him be-

[154] ASPR Comm. Minutes, 8 Nov. 1961.
[155] Technitrol Engineering Corp., ACAB 1084, 9 Feb. 1968.
[156] Dyco, Inc., AFCAB, 11 Dec. 1968.
[157] Perkin-Elmer Corp., NCAB, 20 Oct. 1967. The NCAB does not identify this case as government action and arguably this case could be considered correction of a mistake. However, since the adjustment was authorized because the contracting officer inserted an improper royalty provision in the contract it is considered a government action case.

cause of unfair actions of the Government whether such losses are lost profits or overall loss on the contract. For this reason, the decision of the ACAB in specifically providing for lost profit, as well as covering increased costs, is sound. Accordingly, any reluctance on the part of CAB's to authorize adjustments because a contractor who has been treated unfairly managed to realize some reduced profit on the contract is not consistent with the spirit or intent of P.L. 85–804 and ASPR.

d. Whether considerations of fairness justify a determination that it will facilitate the national defense to adjust the contract. As in all the theories for contractual adjustment based on fairness and equity, the requirement that a contractual adjustment on the basis of government action facilitate the national defense is evaluated objectively. An objective approach, as previously discussed,[158] is based on the policy that treating individual contractors fairly enhances the overall procurement program of DOD. Thus, even though individual contractual adjustments benefit only the contractor directly, the adjustment facilitates the national defense by showing other contractors that they too will be treated fairly in their dealings with the Government. Therefore, if the evidence submitted in support of a request for adjustment establishes that a government action has been taken which was unfair to the contractor, it will facilitate the national defense to adjust the contract provided there are no unusual circumstances overcoming the proven equities on behalf of the contractor.[159]

B. *MISTAKE*

Extraordinary contractual adjustment on the basis of mistake is authorized in ASPR in the following language:

> A contract may be amended or modified to correct or mitigate the effect of a mistake, including the following examples:
>
> (i) a mistake or ambiguity which consists of the failure to express or to express clearly in a written contract the agreement as both parties understood it;
>
> (ii) a mistake on the part of the contractor which is so obvious that it was or should have been apparent to the contracting officer; and
>
> (iii) a mutual mistake as to a material fact.[160]

The similarity of this language to that used in describing mistake in traditional contract law has caused some writers to con-

[158] *Supra* notes 65–68 and accompanying text.

[159] As an idea of how seldom unusual circumstances occur overriding proven unfairness to a contractor, there is only one known decision to this effect since P.L. 85–804 was enacted, *supra* note 68.

[160] ASPR § 17–204.3.

clude that the rules followed when considering mistake as a basis for extraordinary contractual action are identical to those followed by the federal courts and the Comptroller General.[161] This is a dangerously inaccurate conclusion because many requests for contractual adjustment based on mistake involve facts and circumstances completely different from those normally found in mistake cases considered under the usual rules of contract law. It is, therefore, helpful first to identify the phases in the DOD procurement process in which the question of mistake may arise and then to determine when extraordinary contractual action is authorized to correct these mistakes. With this as a background, the scope of the mistake theory under P.L. 85–804 and the principles used in its application will be examined.

1. *The Impact of an Allegation of Mistake on Contract Administration.*[162]

The method by which a claim of mistake is administratively processed depends upon whether mistake is alleged prior to or after contract award. In formally advertised procurements in which offers are submitted in the form of sealed bids, many mistakes are initially discovered at the time bids are opened prior to award. Allegations of mistake at this time are handled pursuant to rigid procedures established by ASPR.[163] Correspondingly, at this point in the procurement process P.L. 85–804 has no application. Prior to award of negotiated contracts mistake is not normally a problem because, unlike the bidder on a formally advertised contract who may not withdraw or change his bid after opening for a specified time, the offeror in a negotiated contract

[161] *E.g.*, Jansen, *Public Law 85–804 and Extraordinary Contractual Relief*, 55 GEO. L. J. 959, 987 (1967).

[162] A discussion of mistake in government contracting other than as covered by P.L. 85–804 is beyond the scope of this article. *See*, Doke, *Mistakes in Government Contracts—Error Detection Duty of Contracting Officers*, 18 SW. L. J. 1 (1964), for an in depth consideration of a major portion of the law of mistake in government contracting in other than P.L. 85–804 situations.

[163] ASPR § 2–406. If a contractor discovers a mistake in his bid prior to opening he may correct it by submitting a modification to his original bid provided the modification is received by the Government prior to the time set for bid opening (ASPR § 2–304). After opening for reasons of protecting the integrity of the formal advertising system it is imperative that bidders be permitted to alter their bid on the basis of mistake only in well defined circumstances. Thus, the strict approach of ASPR is both necessary and well justified. These ASPR provisions are largely based on Comptroller General opinions which make up the authoritative source of legal opinion followed by government agencies in settling disputes with contractors arising prior to contract formation.

may withdraw or change his offer up until the time for contract award.[164]

Mistakes alleged after award are handled indentically in both formally advertised and negotiated contracts.[165] ASPR authorizes HPA's and certain other designated officials[166] to correct mistakes alleged afterward if the mistake is mutual, or if the contracting officer should have been on notice of the error prior to award. The correction may be in the way of rescission of the contract, reformation of the contract, or deletion of the item of supply or service involved in the error from the contract. This authority to correct mistakes is limited in that any reformation, rescission, or deletion may not result in a price increase or decrease in excess of $1,000, or cause the corrected price to be more than the next higher bid or offer for the supplies or services concerned.[167] Any mistake alleged after award, not covered by this authority, is required by ASPR to be processed as a request for extraordinary contractual action under P.L. 85–804.[168] Thus, mistake cases are considered under P.L. 85–804 only after award of a contract and then only when the requested adjustment cannot be made by the HPA, using the normal procurement procedures available to him.

2. *The Scope of an HPA's Authority to Authorize Adjustments on the Basis of Mistake.*

As previously mentioned, there is a tendency to restrict the scope of mistake under P.L. 85–804 to the meaning of mistake as used in the law of contract formation.[169] The legislative history of P.L. 85–804, however, indicates that Congress was concerned with mistakes in government contracting not in the strict legal sense, but rather in a broader sense. This is evidenced by the

[164] U.S. DEP'T OF ARMY, PAMPHLET NO. 27–153, PROCUREMENT LAW 110 (1961). However, in so-called competitive negotiations in which many of the rules of formal advertising are used (*i.e.*, a stipulation of a specific length of time within which the Government may accept a proposal and the offeror cannot withdraw it (ASPR § 3–501(b)(xiii)), it is possible that claim of mistake could become critical prior to award in negotiated procurements. ASPR presently does not cover this situation.

[165] *See* ASPR §§ 2–406.4, 3–510.

[166] ASPR § 2–406.4(c).

[167] ASPR § 2–406.4(b).

[168] ASPR § 2–406.4(g).

[169] The general rule is that a mistake which prevents the parties from achieving a meeting of the minds (*i.e.*, when the parties thinking that they have the same thing in mind actually mean different things), or one in which the parties are mutually mistaken as to a material fact, is ground for rescission of the contract. This rule of law is rigidly applied and it is not easy for a party to a contract to prove a mistake which will justify rescission.

House Report on P.L. 85–804 which included the following paragraph:

> In a military procurement program as large as that in which we have been engaged, some mistakes in entering into contracts by both the Government and the contractors are inevitable. It may take the form of a mutual mistake as to a material fact; it may be a failure to express in the written contract the agreement as both parties understood it; or it may be a mistake on the part of the contractor which is so obvious that it was or should have been apparent to the contracting officer. The assurance to contractors that unavoidable mistakes and ambiguities of this kind will be fairly and expeditiously corrected is a most significant factor in securing uninterrupted performance and cooperative sources of supply.[170]

As can be seen, the three types of mistakes discussed in the House Report are only illustrative, or non-exclusive examples, of mistakes or ambiguities in contracts that might arise in a procurement program as large as that of the national defense effort. Additionally, ASPR § 17–204.3, in setting out these three types of mistakes, parallels closely the theme of the House Report by providing that "a contract may be amended or modified to correct or mitigate the effect of a mistake, including the following examples. . . ." Again the basic thought is that mistakes may be corrected, and the three specifically named types of mistakes are only some of the kinds of mistakes which might arise and merit correction.

Notwithstanding the broad interpretation of mistake the foregoing analysis seems to justify CAB's have consistently attempted to fit mistake cases into one of the three ASPR examples, and have only rarely authorized adjustment on a mistake of a different nature. This procedure has led some writers to conclude that HPA's may amend a contract on the basis of mistake only when the case fits one of these specific examples. According to this view, all other cases of mistake must be processed to a CAB for consideration as a case beyond the authority of an HPA.[171]

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[170] H.R. REP. No. 2232, 85th Cong., 2d Sess. 4 (1958).

[171] This position is predicated on the requirement of ASPR § 17–203(a)(ii), which authorizes HPA's to take affirmative action on requests for contractual adjustment only in the examples of mistake and informal commitment described in ASPR §§ 17–204.3 and 17–204.4. These two paragraphs set out first a general description of the authority granted, followed by specific examples of this authority which are not represented as being exclusive. As a result of this editorial technique in ASPR, the question arises whether the example to which the HPA is limited is the general description of mistake and informal commitment; or is his authority restricted to the three specific examples of mistake and the two specific examples of informal commitment following the general description of mistakes and informal commitment? *See* Jansen, *Public Law 85–804 and Extraordinary Contractual Relief*, 55 GEO. L. J. 959, 985, 992, 995 (1967).

This view unnecessarily emphasizes the three specific ASPR examples of mistake and fails to take into consideration the basic intent of P.L. 85–804. This intent is to provide a means to amend contracts to correct these three types of mistakes, as well as any other mistake or ambiguity in a contract, if fairness justifies correction. Furthermore, it is reasonable to interpret the language of ASPR as establishing mistake in this broad context as the example of a contractual adjustment an HPA is authorized to make. Therefore, the better view is believed to be that the specific examples of mistake in ASPR are only illustrations of some of the types of mistake that are included in the overall ASPR example of mistake. Accordingly, HPA's may authorize contractual adjustments in mistake cases other than the three specific ASPR examples if such action is warranted.

3. *Mistake or Ambiguities Justifying Contractual Adjustment.* In this part the factors in evaluating a request for contractual adjustment on the bas'is of mistake will be examined with primary emphasis on the three types of mistake described in ASPR. Unlike the other theories for contractual adjustment these factors are relatively simple. It must be found that a mistake was made and that the national defense will be facilitated by correcting the mistake. The following discussion will consider each of these points in detail.

a. Failure to express in the written contract the agreement as the parties understood it.[172] The CAB decisions concerning "failure to express" mistakes have been reasonably uniform and not difficult to follow. Illustrative of this is the AFCAB decision in *Douglas Aircraft Co.*[173] Here the contractor and the Government entered into an agreement supplemental to an existing contract, which among other things erroneously purported to settle any claim the contractor had for payment for performing additional testing ordered by the Government after award of the existing contract. The AFCAB found that at the time the supplemental agreement was executed, neither the contractor nor the contracting officer intended that it cover this work. On the contrary it was intended that at a later date the parties would negotiate an agreement compensating the contractor for the additional testing. The supplemental agreement, therefore, failed to express the agreement as both parties understood it, and contractual adjustment was authorized.

[172] ASPR § 17–204.3(i).
[173] AFCAB, 11 May 1965.

Another typical example of a "failure to express" mistake is the NCAB's *FMC Corp.* decision.[174] In this case the parties intended to include a clause in the contract which would permit the contractor to be paid progress payments at the rate of 70 percent.[175] Mistakenly, however, the parties failed to insert language in the contract which made the progress payment clause operative. The NCAB concluded that the contract failed to express the agreement as both parties understood it, and authorized amendment of the contract to include the language necessary to make the progress payment clause effective.

Because of the increasing sophistication of government procurement, "failure to express" mistakes sometimes occur as a result of understandings reached between the parties under contracts involving the development of a piece of equipment which is subsequently not reflected in the production contract. Thus, in *United Aircraft Corp.*,[176] the contractor developed a jet engine which met all performance requirements of the development contract. At this time it was agreed between the parties that further testing would not be required in the production contract. None theless the production contract contained provisions for further performance testing. In deciding this case the NCAB considered the prior course of dealings between the contractor and the Government in the development of the jet engines, and determined that it had been the intent of the parties not to require further performance qualification. On this basis authority to amend the contract by deleting any such requirement was granted.

These cases demonstrate the point that "failure to express" mistake cases are relatively simple, and become complicated only in procurement of sophisticated equipment or systems involving several contracts. It is interesting to note that many "failure to express" mistake cases involve uncontested fact situations, in which both the contractor and contracting officer are in full agreement that the contract did not express the understanding of the parties. As a result, CAB's have had a relatively easy time of disposing of meritorious requests for contractual adjustment based on this type of mistake.

b. Mistakes on the part of the contractor which are so obvious that they were or should have been apparent to the contracting

[174] NCAB, 4 Nov. 1966.

[175] Progress payment clauses permit a contractor to be paid "as work progresses under a contract, upon the basis of cost incurred, of percentage of completion accomplished, or of a particular stage of completion." ASPR Appendix E–106.

[176] NCAB, 25 Jun. 1968.

officer.[177] Contract reformation or rescission on the basis of "apparent" mistake, as permitted by the courts and Comptroller General, is predicated on the doctrine that acceptance of a bid by a contracting officer who has either actual or constructive knowledge that the bid is erroneous does not consummate a binding contract.[178] ASPR, in recognition of this rule, contains specific instructions for contracting officers, requiring that they take affirmative action to verify bids which are suspected of containing a mistake prior to award.[179] Allegation of "apparent" mistake in bid after award, for reasons previously explained,[180] are usually processed as an extraordinary contractual action.[181]

The "apparent" mistake cases come the closest of any to justifying the view that the legal rules of mistake enunciated by the courts and the Comptroller General are followed by the CAB's in making their decision. This is true because like the Comptroller General and the courts, CAB's assess the facts of each case for evidence which either caused or should have caused the contracting officer to know that the contractor's bid contained a mistake. If so, contractual adjustment is authorized. The following discussion of two of the more recent CAB decisions is illustrative of this point.

In *Wolverine Tube Division of Calumet & Meda, Inc.*,[182] the contractor quoted a price of $3.3755 per foot for copper nickel alloy tubing. The contractor discovered, after delivering a substantial amount of the tubing, that he had erroneously calculated his quotation on the basis of tubing smaller in diameter than that called for by the contract. Based on the correct size of tubing his quote should have been $1.72 per foot higher. The NCAB found that the contractor's original quotation was $2.58 per foot lower than the second lowest quotation and furthermore was approxi-

[177] ASPR § 17–204.3(ii).

[178] *See generally* Doke, *Mistakes in Government Contracts—Error Detection Duty of Contracting Officers*, 18 Sw. L. J. 1 (1964).

[179] ASPR § 2–406.3(e).

[180] *Supra* notes 163–168 and accompanying text.

[181] It should be noted that the apparent mistake doctrine is a development of procurement law concerning submission of sealed bids in formally advertised procurements. No distinction between negotiated contracts and formally advertised contracts is made in ASPR, however, in cases of mistake alleged after award. Thus, the rules of apparent mistake are applied to both types of procurement after award and, if it is determined that the contracting officer should have known that the contractor had made a mistake in his bid in a formally advertised contract or proposal in a negotiated contract, contractual adjustment on the basis of apparent mistake may be authorized.

[182] NCAB, 23 May 1966.

mately $2.00 per foot lower than other recent procurements of the same tubing. Based on the wide disparity between the quoted price and these prices, it was concluded that the contracting officer should have known that the quotation contained a mistake, and contractual adjustment was authorized.

One of the most comprehensive CAB decisions on this point is the TCAB *American Ship Building Co.* decision.[183] In this case the contractor alleged that the contracting officer should have known that there was a mistake in its bid on a contract for the construction of seven 210-foot cutters, because its bid was grossly lower than either of the other two bids, substantially below the Government's estimate of the cost of the cutters, and substantially below the price of earlier procurements of this type of vessel. The TCAB found, after carefully analyzing Comptroller General decisions and other legal authority, that the contractor's claim of "apparent" mistake was not supported by the facts, and refused to amend the contract. The contractor's contentions in this case are illustrative of three principal indicators of apparent mistake, as developed by Comptroller General decisions. Additionally, this case is a good example of the point that legal precedents are used in analyzing "apparent" mistake cases under P.L. 85–804.

It is beyond the scope of this article to discuss the legal considerations of "apparent" mistake other than to point out the basic considerations bearing on such cases and that legal precedents are followed in deciding such cases. It should be noted, however, that once "apparent" mistake is found, the CAB's have on occasion taken an approach different from the Comptroller General and the courts in correcting the mistake. The usual relief granted a contractor when mistake is discovered after award is either correction of the mistake or cancellation of the contractor's obligation. While CAB's most frequently follow this practice, they sometimes adjust the contract so that the loss to the contractor caused by the mistake is only reduced. The NASACAB reasoned in one case that even though the contracting officer should have known there was a mistake, the mistake in bid was made unilaterally and without fault on the part of the Government. It was, therefore, decided that the amount of the adjustment authorized should be limited to the direct cost of material attributable to the mistake and should not include any indirect cost or lost profit.[184]

This sort of compromise adjustment is considered reasonable in

[183] TCAB, 85–804–3, 12 Nov. 1968.
[184] Hy-Cal Engineering, NASACAB, 27 Jan. 1966.

light of the equitable nature of contractual adjustments under P.L. 85–804. The problem with such approach, however, is the difficulty in comparing the error in bid made by the contractor with the error of the contracting officer in failing to notice the apparent mistake, and deciding how much of the cost of the mistake the contractor should absorb. Therefore, while it is within the prerogative of a CAB or an HPA to exercise discretion in determining the extent to which a mistake will be corrected, in most instances the correction authorized should be in an amount necessary to put the contractor in the same position he would have been had the mistake not been made.

c. Mutual mistake of material fact. Mutual mistake of material fact is defined in contract law as a mistake shared by both parties concerning the subject matter, the price, or the terms of the contract. Before such a mistake affects the binding force of the contract, however, the courts have held that the mistake must be of an existing or past fact (not a future event) which is material, *i.e.*, an essential fact which induced the parties to enter the contract.[185] CAB's in considering mutual mistake cases have not followed this rigid legal definition. Rather, as the following discussion demonstrates, mutual mistake under P.L. 85–804 is a much broader concept than its contract law counterpart.

A number of decisions concerning mutual mistake of material fact have involved situations where the mutual mistake concerned matters other than those bearing on contract formation. For example, in *Firth Sterling, Inc.*,[186] the contract called for the production of an armor piercing shell. During production it was learned that for no apparent reason the shell's trajectory was erratic and it could not be fired with accuracy. Both the Government and the contractor believed the problem to be the result of unknown manufacturing errors on the part of the contractor. After considerable delay and expense, the reason for the problem was discovered to be insufficient paint on a critical groove on the shell. The Government's specifications on this point were general, and paint thickness advisory. The ACAB found that the specifications were inadequate in failing to indicate the necessary thickness of paint to be applied to the groove, and that the contractor and the Government had been mutually mistaken in their belief that the contractor's manufacturing process was at fault. This mistake was determined to be a mutual mistake of material fact justifying contract amendment.

[185] 17 AM. JUR. 2D, *Contracts* § 143 (1964).
[186] ACAB No. 1079, 25 Sep. 1967.

This case is a good illustration of the CAB practice of applying the language of ASPR in its common or everyday meaning, rather than as a lawyer might interpret it. The mutual mistake of material fact in *Firth Sterling, Inc.*, occurred after contract formation and, therefore, could not have been an essential fact which induced the parties to enter the contract. Moreover the mutual mistake found by the ACAB concerned an error in the belief of the parties over a production problem which was not a fact relating to subject matter, price, or terms of the contract as contemplated by the legal definition of mutual mistake of material fact. Notwithstanding this variance from the traditional meaning of mutual mistake, it is doubted that operating personnel or nonlawyers would have any difficulty in agreeing that the mistake was mutual, and that it was a material fact because the erroneous belief that the contractor's production process was at fault cost the contractor a substantial sum of money.[187]

A second important variation of mutual mistake of material fact from the strict legal concept is that under P.L. 85–804 a mutual mistake of material fact concerning a future event may justify contractual adjustment. In *RCA Victor Co. Ltd.*,[188] the contractor was to produce sophisticated communications equipment to be used in the U.S. space program. Because of design problems the contractor experienced much higher cost than anticipated by either party, resulting in the contractor's suffering a substantial loss. The NASACAB considered the key issue of the case to be whether the parties were mistaken in failing to foresee the extent of the developmental work necessary to perform the contract. Concluding that the parties had failed to foresee the nature and extent of engineering developmental work ultimately required to

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[187] Another case in which mutual mistake of material fact was found which does not square with the legal definition is Campeau Tool and Die Co., ACAB No. 1085, 23 Jan. 1968. Both the contractor and the Government thought the contractor was in production of a particular brake shoe assembly when in fact the contractor was in production of a similar less expensive assembly. This mistake caused the contractor to underbid seriously, verify his bid when requested to do so, and the Government to conclude that the contractor could produce at the bid price. Neither party was mistaken as to the subject matter, the verified price the contractor intended to bid, or the terms of the contract. Rather the mutual mistake was to an underlying collateral condition which had no direct bearing on the formation of the contract, but did cause the contractor to miscalculate his bid and the Government to accept it as accurate. (A good argument could be made that this case should have been treated as apparent mistake under ASPR § 17–204.3(ii).)

[188] NASACAB, 27 Dec. 1968.

be performed, the NASACAB authorized contractual adjustment. Thus, unlike the contract law situation in which a contractor must bear the burden of unforeseen difficulty of performance, in the proper case a contractor may obtain a contractual adjustment mitigating such miscalculation under P.L. 85–804 as a mutual mistake of material fact.[189]

The foregoing discussion is not intended to imply that all cases of mutual mistake under P.L. 85–804 are other than the situation contemplated by the contract law definition. This is demonstrated in the ACAB decision in *Avco Corp.*[190] Here the contractor and the Government entered a maintenance contract for government radar stations, some of which were situated in isolated locations. Since both the contractor and government procurement personnel had not been involved in previous contracts covering this service, they were unaware that per diem had been paid to the previous contractor's employees assigned to the isolated stations and failed to include this factor in the contract price. Without this payment the contractor would have been unable to man the isolated stations and, in fact, incurred much higher cost than anticipated by paying employees assigned to these stations per diem even though the contract did not provide for it. The ACAB found that the contractor and the Government were mutually mistaken as to a material fact effecting price, and permitted contractual adjustment.

d. Other mistakes. The three specific examples of mistake discussed above cover the great majority of mistake cases that may be expected to arise under P.L. 85–804. Since these examples are not exclusive,[191] however, other cases of mistake deserving consideration under P.L. 85–804 are possible. While it is not feasible to anticipate every situation which might fit the category of "other mistake," analysis of the few CAB decisions concerning "other mistake" reveals that most such cases involve unilateral mistake. The best example of this point is the decision in *Machinery Sales Co.*[192] Here the contractor had committed an inadvertent clerical error in adding up a column of figures. This was established by comparing the contractor's scratch sheet used to compute his

[189] Hayes International Corp., NASACAB, 18 Nov. 1965, is another case in which contractual adjustment was authorized on the basis of a mistake concerning a future event. Here it was concluded "that the Government and Hayes made a mutual mistake as to material factor in failing to realize or anticipate, in advance of the execution of the contract, the number of drawing changes which would be required during the course of performance of the contract."

[190] ACAB No. 1095, 17 Oct. 1968.

[191] *Supra* notes 169–171 and accompanying text.

[192] NASACAB, 20 Jun. 1967.

offer with the contractor's published price list for the items involved. The error was not so great, however, that the contracting officer should have known that a mistake had been made and, therefore, was a unilateral error of the contractor's made without fault on the part of the Government. The NASACAB found that since the error was purely inadvertent, considerations of fairness and equity did not permit the Government to receive the entire benefit of the contractor's error. The contractual adjustment authorized, however, unlike most adjustments on the basis of mistake, did not place the contractor in the same position he would have been had the mistake not been made. Instead the contract price was increased only enough to cover the cost incurred by the contractor as a result of the mistake but did not allow a profit on that portion of the contract.

The AFCAB used a similar rationale in *C&M Associates.*[193] Here the contractor's offer was significantly lower than the second lowest offer. The Government asked the contractor to verify his offer, which he did. Subsequently the contractor discovered his error and requested correction. The AFCAB concluded that while Air Force personnel had acted reasonably and, therefore, were in no way at fault for the mistake, the fact remained that the Government had received supplies worth substantially more than the Government paid. Therefore, a contractual adjustment was authorized correcting the contractor's unilateral mistake by increasing the contract price by the amount of the contractor's direct loss excluding general and administrative expenses.

e. Facilitation of the national defense. The final factor to consider in mistake cases is whether the national defense will be facilitated by correcting the mistake. ASPR provides guidance on this point in the following language: "Amending contracts to correct mistakes with the least possible delay normally will facilitate the national defense by expediting the procurement program and by giving contractors proper assurance that such mistakes will be corrected expeditiously and fairly."[194]

This provision establishes an objective standard for facilitation of national defense in mistake cases. As previously discussed, under this approach the national defense is facilitated by adjusting contracts even though there is obviously no direct benefit to the Government to do so. Again the concept is that by treating an individual contractor fairly, the defense procurement program will be indirectly enhanced by showing other contractors that

[193] AFCAB, 2 Jun. 1965.
[194] ASPR § 17-204.3.

they too may expect to be treated fairly by the Government. This is not to say that in some unusual cases the equities of the circumstances may be such that, in spite of a mistake that would normally support contractual adjustment, overall considerations of fairness preclude adjustment.

C. *INFORMAL COMMITMENTS*

As pointed out previously the apparent authority doctrine does not apply to government agents.[195] In the normal course of government business, however, situations sometimes develop in which persons furnish services or supplies in reliance on the apparent authority of government agents who in fact do not have authority to enter a binding contract on behalf of the Government. As a result the Government receives the benefit of supplies or services while the person furnishing them has no legal remedy for obtaining payment. In passing P.L. 85–804, Congress provided a basis for paying persons who have suffered a loss under these circumstances. ASPR expresses this authority in the following language:

> Informal commitments may be formalized under certain circumstances to permit payment to persons who have taken action without a formal contract; for example, where any person, pursuant to written or oral instructions from an officer or official of a Military Department and relying in good faith upon the apparent authority of the officer or official to issue such instructions, has arranged to furnish or has furnished property or services to a Military Department or to a defense contractor or subcontractor without formal contractual coverage for such property or services. Formalization of commitments under such circumstances normally will facilitate the national defense by assuring such persons that they will be treated fairly and paid expeditiously.[196]

It is important to note two limitations on use of this authority. An informal commitment may not be formalized unless a request for payment has been filed within six months after a person arranges to furnish or furnishes supplies or services in reliance upon the commitment,[197] and unless it is found that at the time the commitment was made it was impracticable to use normal procurement procedures.[198] Furthermore, as in all extraordinary contractual adjustments, an informal commitment may not be formalized unless it is determined that such action will facilitate the national defense. The following discussion will consider the scope of informal commitment, the significance of the limiting factors, and the question of facilitation of the national defense.

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[195] *Supra* note 7.
[196] ASPR § 17–204.4.
[197] ASPR § 17–205.1(d).
[198] *Id.*

1. *The Informal Commitment.*

Informal commitments arise when a government agent without authority orally or in writing requests supplies or services, or when from the facts and circumstances of a case an implied request for the supplies or services is shown. The following is an analysis of each of these situations.

Cases of oral and written informal commitments are reasonably simple to evaluate. Such cases are examined for evidence of an oral or written informal commitment by a government agent, reliance and good faith by the person furnishing or arranging to furnish the supplies or services, and benefit received by the Government or cost incurred by the person in arranging to perform. If all factors are present, and provided limitations on formalization are not applicable, the informal commitment is formalized by entering a contract covering the commitment.

Federal Pacific Electric Co.[199] is a typical case of oral informal commitment. Here the company had a contract with the Navy under which it was to furnish up to 300 hours of engineering services. As a result of increased requirements the 300 hours of engineering services were performed much sooner than anticipated. After improper assurances by a Navy agent that the existing contract would be modified to cover additional services required, the company performed 850 more hours of services without contractual coverage. At this point the Navy refused to modify the contract because to do so would constitute contracting after performance in violation of regulations and law. The NCAB found that the company had relied in good faith upon the assurances of a government agent and that in fairness it should be compensated. As none of the limitations on formalization of informal commitment were applicable, extraordinary contractual action was authorized.

The AFCAB decision in *Aerojet-General Corp.*[200] (Aerojet) is a good example of an informal commitment based on a written request, being authorized even though the Government never received the requested supplies. Because of the long lead time required for production of rocket engines, Aerojet was improperly notified in writing to proceed with certain aspects of the work during preliminary contract negotiations prior to contract award. Aerojet proceeded on this basis and thereby incurred costs. Before contract award, a cut-back was ordered in the rocket program, and the contemplated procurement of rocket engines from

[199] NCAB, 12 Aug. 1966.
[200] AFCAB, 14 Jan. 1966.

Aerojet was cancelled. The AFCAB had little trouble in finding that Aerojet had relied in good faith on the written request of a government agent to begin preliminary work, and authorized the informal commitment to be formalized to compensate Aerojet for incurred cost.

Implied informal commitment is a development primarily of the ACAB. The best recent example of an implied informal commitment which demonstrates the correct approach in these situations is the *St. Louis-San Francisco Railway Co.* decision [201] (hereafter referred to as Frisco). Here Frisco had furnished rail switching services for Fort Leonard Wood, Missouri, for 15 years on the basis of a one-year contract made in 1950 and renewed annually thereafter. In 1965 the Government decided to negotiate a completely new contract. Negotiations were conducted and agreement on the new terms reached. At this point the proposed new contract was forwarded for approval to higher authority within the Government. As a result of inexplicable delay on the part of the Government in reviewing the proposed new contract, Frisco furnished switching services for approximately 18 months without contractual coverage. In an effort to be compensated for these services Frisco requested under P.L. 85–804 that a contract be written to cover the already furnished services on an informal commitment theory. When the case was heard by the ACAB no evidence was presented by either the Government or Frisco which indicated that a government agent either orally or in writing requested the switching services. The ACAB authorized formalization, however, on the basis of an implied informal commitment using the following rationale:

> [I]t is clear that Frisco had for a period of more than fifteen years prior to the period in question rendered certain services pursuant to a written contract; that a follow-on contract for the continuation of such services had been negotiated which, to become effective, needed only the approval of higher authority; that such contract had been submitted for approval in advance of the period services were to commence; that these services were essential to the continued operation of Fort Leonard Wood; and that Frisco was the sole source from which the services could be acquired.[202]

Since implied informal commitment is not specifically mentioned as an example of informal commitment in the ASPR provision describing informal commitment, as are oral and written informal commitments, some writers have taken the view the HPA's may not formalize implied informal commitments, but must forward such cases to their department's CAB for

[201] ACAB No. 1091, 13 May 1968.
[202] *Id.* at 5.

consideration.[203] The better view is believed to be that the example of the type of informal commitments which an HPA may formalize are those in which persons have taken action without a formal contract. The additional language in ASPR, citing oral and written instructions from a government agent as an example of informal commitment, then become only sub-examples or non-exclusive instances when informal commitment may occur. HPA's are considered to have authority, therefore, to formalize implied informal commitments, as well as those resulting from unauthorized oral and written instruction, provided formalization does not otherwise exceed the limitations on an HPA's authority to act under P.L. 85–804.[204]

2. *Impracticability of Using Normal Procurement Procedures.*

Except for the requirement that an informal commitment may not be formalized unless it is determined that at the time the commitment was made it was impracticable to use normal procurement procedures,[205] informal commitment cases would be the least difficult extraordinary contractual action theory to understand. Application of this requirement, however, has caused considerable confusion. The result has been that some meritorious informal commitments have not been favorably considered, whereas others, probably less meritorious, have been formalized. This occurs because with the benefit of hindsight it is nearly always possible to see some way normal procurement procedures could have been used to procure the supplies or services in issue. Such a strict approach to this requirement, however, virtually eliminates informal commitment as a basis for contractual adjustment. At the other extreme is the view that, provided there is no evidence that the informal commitment was used as a convenience or to circumvent normal procurement procedures, the informal commitment should be formalized.[206] This approach goes too far the other way

[203] *Supra* notes 169–171 and accompanying text.

[204] The ACAB has officially adopted this view, as indicated by ACAB letter to HPA's, dated 21 April 1969, subject: Authority of Heads of Procuring Activities to Formalize Informal Commitments—ASPR 17–204.4. This letter advised HPA's that they may formalize implied informal commitments. It is understood that the ACAB informally discussed this interpretation of ASPR 17–204.4 with the NCAB and AFCAB and that both these boards agreed with the ACAB interpretation.

[205] ASPR § 17–205.1(d).

[206] Jansen, *Public Law 85–804 and Extraordinary Contractual Relief*, 55 GEO. L. J. 959, 997 (1967); GOV'T CONTRACTOR BRIEFING PAPERS, *Extraordinary Relief Under P.L. 85–804*, No. 66–3, June 1966. This view is based on a series of ACAB decisions which found impracticability of using normal procurement procedures in circumstances other than urgency or military necessity (*e.g.*, mistake, error, ignorance). The ACAB has retreated sub-

by ignoring the clear meaning of the requirement that use of normal procurement procedures must have been impracticable and, more importantly, is not supported by the apparent intent of Congress in expressly including this restriction in P.L. 85–804.

The legislative history of P.L. 85–804 shows that Congress was concerned that this law might be used to dodge normal procurement regulations and procedures by abusing the authority to formalize informal commitments.[207] As a result the impracticability requirement was included in P.L. 85–804.[208] It is important to note that an "impracticability" finding had not been required for formalization of informal commitments in earlier laws similar to P.L. 85–804. In the House Report concerning P.L. 85–804 this new restriction was recognized with some indication of its purpose as follows:

> A considerable number of situations have arisen in which persons have furnished material or services without a formal contract, relying in good faith upon the apparent authority of officers or employees of the Government. . . . As a result, frequently the Government finds itself in a dilemma. On the one hand it benefits from the materials received or services rendered by a contractor acting in good faith, but on the other there is a need for maintaining a policy of contracting only by authorized personnel through authorized procedures. In permitting administrative formalization of informal commitments which were made because it was impracticable at the time to utilize normal procurement procedures, this bill presents a desirable solution of those competing interests. In doing so, it continues, with some restriction, the formalization policy developed under title II.[209]

The CAB decisions interpreting the "impracticability" requirement defy synthesis. This in itself is some evidence of the problem of balancing the competing interest described in the House Report. The bulk of CAB decisions in which "impracticability" has been found concern emergency or military necessity situations. Thus, the NCAB has found use of normal procurement procedures impracticable when the urgency of the work required to complete ships was such that there was insufficient time to use

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stantially from its liberal interpretation of this requirement as evidenced in its decision in Bell Aerospace Co., ACAB No. 1088, 19 Apr. 1968. Here the ACAB found that: "[I]t is not manifest from the evidence before the Board that the use of normal procurement procedures was impracticable. Rather it is indicated that attempts to use normal procurement procedures were attempted, but were frustrated as a result of misunderstanding of what those procedures were. At best there has only been a showing that there was no intent to circumvent normal procurement procedures." *Id.* at 4.

[207] *Hearings Before the Subcomm. No. 4 of the House Comm. on the Judiciary*, 85th Cong., 2d Sess., ser. 20, at 15 (1958).

[208] 50 U.S.C. § 1432(f) (1964).

[209] H.R. REP. No. 2232, 85th Cong., 2d Sess. 4 (1958).

normal procurement procedures.[210] The NCAB found, however, that it had not been impracticable to use normal procurement procedures in a non-urgent situation, even though an agent of the Navy specifically directed that work be started.[211]

The ACAB has concluded that use of normal procurement procedures was impracticable when execution of a contract was delayed as a result of the sudden large build-up of U.S. Forces in Vietnam.[212] Nevertheless, in circumstances in which all that could be shown was that there was no intent to circumvent normal procurement procedures, the ACAB declined to find that it had been impracticable to use normal procurement procedures.[213]

Both the ACAB and AFCAB have considered cases which might be called emergency or urgency situations, but are perhaps better categorized as circumstances in which normal procurement procedures were inadequate. In *Aerojet-General Corp.*[214] the Air Force developed a requirement for delivery of a rocket engine by a date which necessitated Aerojet to begin preliminary work prior to the time negotiation of a contract using regular procedures could be completed. The AFCAB found that the long lead time required for the production of the engines caused it to be impracticable to use normal procurement procedures to accomplish the procurement. In *St. Louis-San Francisco Railway Co.*,[215] existing regulations required the procuring activity to submit a proposed contract for vital rail switching services to higher headquarters prior to its execution. After considerable delay it was determined that this regulation was in fact not applicable to the contract, although it appeared to be. As a result of the delay in reaching this decision, rail switching services were performed without contractual coverage. The ACAB found that under the circumstances normal procurement procedures were not available at the time that the services were required and, therefore, it was not feasible to follow them.

These decisions,[216] considered along with the legislative history of P.L. 85–804, lead to the conclusion that finding use of normal

[210] Federal Pacific Electric Co., NCAB, 12 Aug. 1966.
[211] Consolidated Controls Corp., NCAB, 14 May 1964.
[212] Republic of Vietnam, ACAB No. 1082, 17 Mar. 1967.
[213] Bell Aerospace Corp., ACAB No. 1088, 19 Apr. 1968.
[214] AFCAB, 14 Jan. 1966.
[215] ACAB No. 1091, 13 May 1968.
[216] Numerous other CAB decisions could be related which vary from the general parameters of the impracticability requirement illustrated in the decisions discussed above. For the purposes of clarifying the proper application of this requirement, however, they are considered representative of the best approach to this issue.

procurement procedures impracticable at the time the informal commitment was made is not difficult in situations involving urgency, unusual military developments, and inadequate procurement procedures. It becomes more difficult to find true impracticability in situations when error, negligence, or ignorance is the primary reason that normal procurement procedures were not followed. This is true even though the Government may have clearly received a benefit. This latter point upon occasion has caused both CAB's and legal writers to rationalize that a literal application of the impracticability requirement was not intended. Contrary to this view, however, it seems clear that Congress desired to restrict the use of informal commitment and believed that the impracticability test was the fairest way to accomplish this purpose without completely denying informal commitment as a basis for extraordinary contractual action. Accordingly, while a liberal approach is recommended in resolving close cases, some showing that use of normal procurement procedures was truly impracticable is required before formalization of informal commitment is authorized.

3. *Request for Payment Must Be Made Within Six Months.* The second special limitation on formalization of informal commitments is that a request for payment must be made within six months after arranging to furnish or furnishing the supplies or services in reliance upon the commitment.[217] The obvious intent of this requirement is to prevent stale allegations of informal commitment and in most cases poses little problem in application. On the other hand, since informal commitments frequently arise in circumstances which are confused or involve exigency, requests for formalization and payment of a commitment as an extraordinary contractual action sometimes are not filed until well after the specified time has elapsed.

CAB's have consistently taken an enlightened approach to this requirement by determining if some act of the contractor's may reasonably be construed to have constituted a request for payment within the required six-month period. If the facts support such a conclusion this will be considered satisfactory compliance with the requirement. Illustrative of this point is the *St. Louis-San Francisco Railway Co.* decision.[218] Here Frisco furnished switching services to the Government for 18 months without contractual coverage, vouchering at the end of each month for the services. The Government accepted these vouchers but did not pay

[217] ASPR § 17–205.1(d).
[218] ACAB No. 1091, 13 May 1968.

them pending what both Frisco and the Government thought would be speedy approval of a proposed contract covering the already performed services. When it was discovered that only under P.L. 85–804 could Frisco be compensated, the question arose whether the informal commitment could be formalized for any more than the six months immediately preceding Frisco's P.L. 85–804 application. The ACAB had little difficulty with this issue, finding that the monthly vouchers submitted by Frisco constituted a timely request for payment for each month's services even though they were not formally styled as requests for payment of an informal commitment.

This approach is considered appropriate and realistic. It recognizes that frequently it is not until well after six months that many persons who have acted in reliance on an informal commitment know they may obtain compensation only through a P.L. 85–804 application. Therefore, it is the fairest method of dealing with these situations and still protects the interest of the Government by requiring that some effort must have been made to obtain payment within six months. [219]

4. *Facilitation of the National Defense.*

Like government action and mistake, a finding that the national defense will be facilitated is required before an informal commitment may be formalized. Also, like mistake and government action, the test for facilitation of the national defense in informal commitment cases is objective. The objective test for facilitation of the national defense is based on fair and expeditious treatment of all contractors. A fairness finding is particularly easy to make in informal commitment cases where the Government has received value for which it has not paid. Regardless of receipt of value by the Government, however (*e.g.*, the Government does not receive value when a person only prepares to perform in reliance on an informal commitment but does not actually complete performance), under the objective test it also facilitates the national defense to formalize such commitments. Thus, if all other elements of informal commitment are met and none of the limitations apply, a finding that the national defense will be facilited by formalizing the commitment is appropriate in virtually

[219] No case is known in which anything other than a written request for payment has sufficed as a request for payment. In Fidelitone Microwave, Inc., ACAB No. 1098, 17 Apr. 1969, the ACAB refused to find, five years after the alleged commitment was made, that a government agent's verbal suggestion of a course of action in solving a technical problem constituted, by implication, recognition of a request for payment for any work done by the contractor in following the suggestion.

every case. Only when some unusual factor exists negating the equities favoring the person who acted in reliance on the commitment should formalization be denied on the basis that it will not facilitate the national defense.

D. *THE GENERAL POWERS OF A CAB*

CAB's normally evaluate cases forwarded to them on the basis of the three standard examples of contractual adjustments described in ASPR. Unlike HPA's, however, should none of these examples apply, CAB's have additional authority to act. This authority is contained in the ASPR § 17–204.1:

> Although it is obviously impossible to predict or enumerate all the types of cases with respect to which action may be appropriate, examples of certain cases or types of cases where action may be proper are set forth in 17–204.2 through 17–204.4 [amendment without consideration, mistake and informal commitment]. Even if all of the factors contained in any of the examples are present, other factors or considerations in a particular case may warrant denial of the request. These examples are not intended to exclude other cases where a Contract Adjustment Board determines that the circumstances warrant action.[220]

This general power to act is the area of CAB activity which is in the greatest degree of flux and accordingly the most difficult to bring into sharp focus. Early decisions citing the general powers of a CAB used this authority to clarify or amplify the ASPR examples when difficulty was encountered with squaring the facts of a case with a particular example.[221] More recently the trend has been to consider the general powers as something more than simply permitting CAB's flexibility to fit fact situations to the ASPR examples.[222] Now the general powers are being used as a basis for considering cases which do not fit the ASPR examples, but otherwise involve the equitable principles and procurement

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[220] ASPR § 17–204.1.

[221] *E.g.*, University of Alabama, ACAB No. 1024, 6 Mar. 1961. In this case implied informal commitment was recognized as a type of informal commitment, in addition to oral and written commitments.

[222] The need to use the general powers for this purpose is questionable in the first instance. The view previously expressed in this article is that the ASPR examples of informal commitment and mistake are broader than heretofore recognized. The reason behind this strict interpretation of the ASPR examples is believed to have been the result of a reasonable exercise of caution in the early administration of the authority granted by P.L. 85–804. With the benefit of experience this early caution appears to have been unnecessary. Unfortunately and unnecessarily, however, a confusing line of reasoning has developed from these early decisions which distinguishes between kinds of cases of mistakes and informal commitment in which only a CAB may authorize adjustment with the result that the HPA's authority to act in some cases has been incorrectly limited. *Supra* note 171 and accompanying text.

goals contained in P.L. 85–804. The following discussion is an examination of some of the cases in which the general powers theory has been used and an analysis of the potential of this theory.

1. *Unusual Circumstances and International Considerations.*

The *Reuben Wells* decision,[223] used to introduce this article, is one of the best illustrations of the proper use of the general powers. In this case, as a result of the Cuban crisis, the contractor was the victim of a series of events completely beyond his control and of a nature that could happen only to a defense contractor. Had the contractor been held to the strict terms of the contract, he would have suffered serious losses. In this situation the ACAB properly considered this a case beyond the three standard ASPR examples which warranted action under the general powers. The ACAB reasoned that fairness required that the contractor be given relief from the inequitable terms of the contract and, on an objective basis, determined that such action would facilitate the national defense by encouraging other contractors to continue performance in emergency situations not anticipated by the parties at the time the contract was entered.

Another prominent area in which the general powers have been utilized concerns situations which arise in foreign countries. An example of this is the *Giancarlo Guidi* decision.[224] Here an Italian fisherman retrieved an Army drone airplane (voluntarily, according to Army personnel) which had crashed in the Adriatic Sea. The fisherman's claim for payment for these services was ultimately paid as an extraordinary contractual action using the general powers theory. Although not specifically articulated in the decision, consideration of international goodwill played a substantial part in the decision to use P.L. 85–804 in this case. This approach is considered valid since one of the uses of P.L. 85–804, contemplated at the time it was being considered by Congress, was to permit extraordinary contractual action in foreign areas for the purpose of maintaining the prestige of the United States and preserving amicable relations with friendly countries.[225]

These two cases show the flexibility P.L. 85–804 provides in situations that cannot be anticipated, but will arise in the normal course of defense procurement operations. Provided there is a basis for showing that extraordinary contractual action will facilitate the national defense, such as in the interest of international goodwill, fairness, or some other appropriate rationale con-

[223] ACAB No. 1053, 15 Apr. 1963. *Supra* note 4 and accompanying text.
[224] ACAB No. 1044, 31 May 1962.
[225] *Supra* note 64 and accompanying text.

templated by the purpose of P.L. 85–804, there should be no hesitation on the part of CAB's to authorize such action under their general powers. Correspondingly, HPA's must be alert to this potential use of P.L. 85–804, so that these cases will be properly channeled to their department's CAB for consideration as an unusual case.[226]

2. *The General Powers and Non-Consensual Acquisition of Supplies.*

Currently the most important question concerning the use of the general powers involves reliance on this theory to take extraordinary contractual action when the Government has received a benefit from a private person without contractual coverage. These cases involve quasi contract,[227] informal commitments where use of normal procurement procedures was practical,[228] and military operations such as those involved in the Dominican Republic crisis in 1965 and the civil disturbances in the United States in 1968.[229] The following discussion is intended to point out the major factors bearing on the use of the general powers in these cases.

a. Quasi contract and informal commitments where use of normal procurement procedures was practical. The view is frequently expressed that P.L. 85–804 was intended to provide a means to pay any person who furnishes something of value to the Government for which he has not been compensated. This attitude has resulted in extreme pressure on those responsible for administering P.L. 85–804 to authorize extraordinary contractual action in many cases not originally contemplated by the statute.

Paramount among such cases are those where an informal commitment has been made but use of normal procurement procedures was determined to have been practicable, thus precluding formalization. In most of these cases it is clear that government agents have misled the contractor, and the Government has received a benefit. Notwithstanding the obvious equities in favor of the person furnishing supplies or services in such cases, Congress

[226] *See* ASPR § 17–203(a)(iii)(B).

[227] Quasi contract for purposes of this article includes only those cases when the Government did not request or consent to performance, *i.e.*, performance was voluntary.

[228] These cases involve consent on the part of the Government; however, since formalization is precluded on an informal commitment theory, the question is raised whether the benefit received by the Government may be compensated on the basis of quasi contract.

[229] In these cases supplies are acquired by the Government without consent of the owner.

specifically addressed this issue by restricting formalization only to those cases where it is found that it was impracticable to have used normal procurement procedures.[230] In the face of this clear mandate it is concluded that if the facts of a case show an informal commitment, but that normal procurement procedures were practicable, the general powers of a CAB are not available to circumvent this restriction.[231]

In quasi contract situations, where no informal commitment has been made by government agents, the equities are less clearly on the side of the person who voluntarily furnished supplies or services on the assumption that he would be paid for the benefit bestowed on the Government. In considering the applicability of the general powers theory to these cases it is important to note Congress's concern over the potential use of P.L. 85–804 to circumvent procurement procedures in informal commitment cases and the corresponding requirement that formalization may not be authorized unless use of normal procurement procedures was impracticable. The result is that in some informal commitment cases, where the equities are more favorable to the person furnishing supplies or services than in quasi contract cases, extraordinary contractual action is precluded. It follows that in quasi contract cases concerning supplies or services normally purchased using regular procurement procedures, the same basic considerations that apply to informal commitment cases apply. Thus, if normal procurement procedures were practicable, extraordinary contractual action should not be authorized. Furthermore, since there has been no misrepresentation by government agents in quasi contract cases, serious consideration must be given to the propriety of compensating persons who have acted prematurely and not necessarily in the best interest of the Government.

[230] Unlike many of the restrictions on use of the authority granted by P.L. 85–804 which are regulatory only, this restriction is included in the law, the implementing executive order, and the administrative regulations.

[231] *But see* Ampex Corp., NASACAB, 5 May 1965. Here the NASACAB authorized contractual adjustment on the following rationale: "However, it is not clear from the record submitted to the Board that normal procurement procedures could not have been used at the time the informal commitment was made, and it is equally unclear that the procedures normally followed under Contract NAS 8–5073 were not in fact followed in this case. The Board therefore considers that the basis for authorizing reimbursement should be under a general theory of quantum meruit, in that Ampex actually supplied the parts and components used for the modification work, acting in good faith and in reliance on the fact that it would be paid for them at the prices agreed upon as fair prices under the contract, and in that the Government has accepted the benefit of the work performed by Ampex."

Whether it facilitates the national defense to take action in such cases is highly questionable.[232] For these reasons it is concluded that, as a general rule, quasi contract cases not connected with military operations discussed below should not be favorably considered under P.L. 85–804.[233]

b. Acquisition of property during emergency military operations. Over the years various international and national rules have developed concerning the right of private persons to restitution for property taken or destroyed during military operations. The international rules of land warfare, however, do not cover military operations such as those which occurred in the Dominican Republic crisis in 1965 or those conducted within the United States during the recent civil disturbances. Additionally, the statutes allowing claims against the United States are generally not applicable in these situations. Due to this gap in the law the question has been repeatedly raised whether action under P.L. 85–804 is permissible to reimburse persons who have had property taken or destroyed by military personnel during emergency military operations.

Review of the legislative history and the law itself shows that P.L. 85–804 was developed to provide flexibility in the defense procurement program to solve problems confronting government procurement personnel in their efforts to obtain required supplies and services for the operation of the defense effort.[234] Nothing in these sources indicates that it was ever contemplated that P.L.

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[232] It is not questioned that the rule of law precluding suit against the Government on a quasi contract theory is harsh. However, nothing in the legislative history of P.L. 85–804 indicates that it was intended to overturn this long standing rule per se. Furthermore, both this rule and the rule of law concerning the non-applicability of the apparent authority to government contracts were in existence at the time P.L. 85–804 was passed. It must be assumed that had Congress desired to alleviate the harshness of the quasi contract rule as it applies to defense contracts in P.L. 85–804 it would have made specific reference to this intent in the reports or the law itself, as it had done with the apparent authority rule.

[233] In Hughes Aircraft Co., ACAB No. 1097, 21 Apr. 1969, the contractor deviated from the contract by performing repair work prior to obtaining approval from the Government. The ACAB found that no informal commitment ordering the work had been made by government agents. In response to the question which basically was whether a quasi contract theory was applicable because of benefit received by the Government, the ACAB ruled that the benefit to the Government of receiving repair work more expeditiously than the contract terms allowed (and by implication the value of the repair work) by itself did not justify contractual adjustment because to do so would encourage carelessness and laxity on the part of persons engaged in defense work, in violation of ASPR § 17–102(b).

[234] *See e.g.*, H. R. REP. No. 2232, 85th Cong., 2d Sess. (1958).

85–804 be used as a means of making restitution to persons who have suffered losses as a result of larceny or destruction of property by military personnel during military operations. In short P.L. 85–804 is not a claims statute.

This view, however, does not preclude extraordinary contractual action in all situations which might arise during military operations in domestic civil distubances, or under circumstances similar to the Dominican Republic crisis. This is true because while military operations are being conducted, there may be procurement going on in the zone of operations, using normal procurement procedures.[235] In these circumstances extraordinary contractual action is permissible on the same basis as it would be in any defense procurement conducted in a less dangerous environment. Additionally, little difficulty is encountered in using P.L. 85–804 when the Government acquires property as the result of a military member making an informal commitment. It is difficult to think of a situation which more aptly encompasses the criterion of informal commitment than when a person in reliance on the apparent authority of a military member acting in an emergency operation furnishes supplies or services to our military forces. The major question, therefore, becomes whether restitution for property taken without consent of the owner by our military forces for direct support of these operations (what in a declared war would be considered requisitioned or confiscated property) may be made under P.L. 85–804 and in particular by a CAB under its general powers.

In answering this question it is first necessary to consider that P.L. 85–804 was intended to provide the procurement flexibility needed in fast moving situations involving the national defense. In these situations it is frequently not feasible to use normal procurement procedures or in our national interest to take steps which make operative various laws providing for restitution to persons whose property is taken without their consent to support military operations. Furthermore, these situations are likely to arise in foreign countries. As previously mentioned, the legislative history of P.L. 85–804 indicates that one of the purposes of the law was to provide a means of solving procurement problems

[235] In Jaragua S.A., ACAB No. 1087, 10 Apr. 1968, the applicant based his request in part on the fact that he negotiated under stress with government procurement personnel for lease of a hotel for U.S. troop housing during the Dominican Republic crisis in 1965. These negotiations took place near the combat zone in the Dominican Republic and within hearing of gunfire.

arising in foreign countries, thereby enhancing international relations.[236]

These factors permit the following conclusions. In civil disturbance operations it is foreseeable that supplies may, as a matter of military necessity, be acquired without consent of the owner. Provided these supplies are obtained for the direct support of such operations and not for the private use of the military personnel involved, it is reasonable to determine that it will facilitate the national defense to authorize extraordinary contractual action. This is considered a valid finding, even though the events leading to the non-consensual acquisition all occur in the United States. Internal security is a prerequisite to a strong national defense against external threats. Therefore, the flexibility in procurement provided by P.L. 85–804 should be equally available in civil disturbance operations, which may reasonably be considered part of the defense effort. In foreign situations such as the Dominican Republic crisis there is even a stronger basis for using P.L. 85–804 to pay for property acquired without consent of owners. In these circumstances a finding of facilitation of the national defense is supportable for most of the reasons discussed above as well as the additional factor that the relations of the United States with a foreign country will be enhanced by taking extraordinary contractual action.

Since non-consensual acquisitions of property during emergency military operations do not involve the three standard theories used to authorize extraordinary contractual actions,[237] the remaining question is whether a CAB under its general powers may act in these cases. The answer to this question may appear obvious, since the language establishing the general powers of a CAB permit CAB's to act in any case deemed to warrant action. The problem is that, in cases resulting from the Dominican Republic crisis, extraordinary contractual action was authorized by the Department Secretaries under their residual powers, which are de-

[236] *Supra* note 64 and accompanying text.

[237] The argument has been made that non consensual acquisition of property may be considered an informal commitment because inherent in the taking is an implied promise to pay. This argument ignores the legislative history of P.L. 85–804, which shows that Congress considered an informal commitment to cover circumstances involving consent in which persons actively and voluntarily furnished supplies and services to the Government. As a result, informal commitment is not considered a flexible concept, which through interpretation may be expanded to encompass non consensual property acquisitions by the Government, a situation never considered by Congress when considering whether to permit the formalization of informal commitments under P.L. 85–804.

fined as encompassing all authority granted by P.L. 85–804 not involving contractual adjustments made by CAB's.[238] Notwithstanding this precedent, the correct approach is considered to be that the general powers theory authorizes CAB's to consider cases of non-consensual acquisition of supplies during military operations in civil disturbances, and in international crises.[239] CAB's are just as well equipped to consider cases of this nature as they are standard procurement cases. Furthermore, any emergency military operation resulting in numerous applications could impose serious administrative problems if secretarial action is required in each case.[240] Thus, it follows that for reasons of both competence and expeditious administrative processing, CAB's ought to take jurisdiction over these cases. Since there is nothing in P.L. 85–804 or ASPR precluding such an approach, the military departments would be well advised to consider sending future cases of this nature to CAB's for consideration as a case falling under their general powers.[241]

IV. CONCULSION

Before DOD and civilian attorneys can properly assess requests for extraordinary contractual action under P.L. 85–804 they must understand both the underlying purpose of this law as well as the principles and standards used in evaluating cases. It must be kept

[238] ASPR § 17–300.

[239] Review of available files in the Office of The Judge Advocate General indicates that the action was taken under the residual powers of the Secretary more as a precautionary measure and for administrative reasons than as a specific decision, that CAB's have no authority in this area.

[240] The secretary could reduce this problem by delegating responsibility for acting in these cases, which is within his authority to do. A member of the ACAB was delegated authority to handle Dominican Republic cases for the Department of the Army. The practical effect was, therefore, as if the ACAB had processed the case *ab initio*. Rather than go through this procedure it seems obvious that if there is a basis to send these cases to a CAB in the first instance, it should be utilized.

[241] The viewpoint expressed above (*supra* notes 227–240) has been adopted in all important particulars by The Judge Advocate General in an opinion issued subsequent to the preparation of this article (JAGT 1969/6152, 14 May 1969). The main points of this opinion are that non-consensual acquisitions of property are not subject to formalization as informal commitments; quasi contract situations are not a type of unfairness which P.L. 85–804 was designed to remedy; and non-consensual acquisition of supplies in direct support of operations in both domestic and foreign emergency military operations, which are not compensable on any other legal basis, may be considered for extraordinary contractual action under P.L. 85–804. Based on this opinion, HPA's receiving requests for extraordinary contractual action based on non-consensual acquisition of supplies during emergency military operations should forward those considered meritorious to their department's CAB as an unusual case.

in mind that P.L. 85–804 is not a claims or hardship statute, but rather an instrument of procurement policy. The foremost consideration in administering this law should be whether the national defense will be facilitated by authorizing extraordinary contractual action.

DOD attorneys must recognize that P.L. 85–804 is not an adversary proceeding. The Government has as great an interest in adjusting contracts when this will facilitate the national defense as does the contractor who will benefit by the adjustment. For this reason, it is appropriate to assist contractors in their efforts to obtain consideration under P.L. 85–804 by providing them information concerning this law. Furthermore, if the full purpose of P.L. 85–804 is to be realized, it is imperative that requests for adjustment be evaluated as expeditiously as good practice will allow.

Civilian attorneys find themselves at a particular disadvantage in preparing requests for extraordinary contractual action, because of the dearth of research material available. Nonetheless, they, too, must be cognizant of the non-adversary nature of P.L. 85–804 proceedings and, most importantly, need to assure that requests for adjustment cover each element of the theory on which they are based. Paramount in this effort is the need to understand the meaning of "facilitation of the national defense," and the distinction between objective and subjective facilitation. If there is one general rule to be followed in preparing a request for adjustment, it is that one well documented and reasoned theory supporting adjustment is far more persuasive than several theories with only generalities offered in substantiation.

When the attorneys associated with requests for extraordinary contractual action have a good grasp of P.L. 85–804, this unusual law serves its purpose well. For this reason a need for sweeping revision or change in P.L. 85–804 is not established by the more than ten years' experience DOD has had in administering this law. Rather the primary problem has been that too frequently the attorneys, both DOD and civilian, responsible for preparing and considering requests lack a good understanding of the legal concepts and regulatory standards governing extraordinary contractual action. Therefore, the most important change required to improve this practice is an informed bar. Hopefully, this article will provide both DOD and civilian attorneys with an additional tool in accomplishing this necessary improvement.

THE OPERATION OF THE KOREAN ARMISTICE AGREEMENT*

By Major Ernest A. Simon**

The Korean Armistice departs from the traditional international law concept of an armistice in its content, the way it was negotiated, and the way it has been applied in practice. The author concludes that the United Nations Command would probably be justified in denouncing the Armistice because of repeated and serious violations by North Korea. But the same factors that make it more than a traditional armistice, coupled with the limitations on the use of force imposed by the U. N. Charter, indicate that the Armistice should be not only kept but expanded.

I. INTRODUCTION

A. *PURPOSE AND SCOPE OF THE INVESTIGATION*

The alarming increase in violations of the *Korean Armistice Agreement*[1] by North Korea during 1967, as compared with previous years, posed a threat to international peace for the United States sufficient to bring the matter before the Security Council of the United Nations.[2] The incidence of infiltration by land and sea into South Korea and the casualties caused by such infiltration raised anew questions concerning the current legal status of the *Armistice Agreement* in international law.[3] To a nation fully

* This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Seventeenth Advanced Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] Agreement Between the Commander-in-Chief, U.N. Command and the Supreme Commander, Korean People's Army, and the Commander of the Chinese People's Volunteers, Concerning a Military Armistice in Korea, [1953] 4 U.S.T. 234, T.I.A.S. No. 2782 (27 Jul. 1953) [hereafter cited as T.I.A.S. No. 2782].

[2] 22 U.N. SCOR, Supp., Oct.–Dec. 1967, at 197, U.N. Doc. S/8217 (1967).

[3] The following questions and comments on the Korean Armistice were made by H. Phleger, Legal Adviser, U.S. Department of State, in 1955: "(a) Is it political or military in character? (b) Is the People's Republic of China bound by it? (c) By whom may it be altered or terminated? In this connection it is interesting to note that the Armistice by its terms

absorbed by its involvement in Vietnam, however, it was the seizure of the *U.S.S. Pueblo* in the waters off the coast of North Korea in January of 1968 that dramatically brought these questions into sharp focus.

The seizure of the *Pueblo* furnishes an excellent example for delineation of the primary purpose of this study. The United States branded the seizure as a violation of international law.[4] The resolution of the incident by reliance upon recognized precepts of international law depends in the first instance upon several critical factual determinations: (1) the location of the *Pueblo* at the time of its seizure, *i.e.*, whether it was located in international waters or in the territorial waters of North Korea; (2) the classification of the *Pueblo, i.e.*, whether or not it was a warship; and (3) the activities in which it was engaged, *i.e.*, whether or not it was engaged in hostile acts.[5]

Independently of the above factors, however, resolution of the incident by reliance upon international law depends upon what set of rules are to be applied. As belligerents in the Korean Conflict, both parties are bound by the *Armistice Agreement of 1953.* If the customary rules governing armistice are resorted to, the parties are technically still in a state of war, de facto and de jure,[6] and the international law of war applies insofar as it is not displaced by the *Armistice Agreement* or the customary rules of armistice. The position that the armistice has ripened into a de facto ending of the war, tantamount to a treaty of peace, is also a tentative alternative,[7] and compels the conclusion that the international law of peace should apply. It has also been suggested in recent literature in the field that the traditional rules of international law, which are based upon the dichotomy between war and peace, are no longer applicable to modern armistices, and that new rules must be given recognition in order to serve best the needs of present-day realities.[8] Which set of rules should apply is pertinent not only to the *Pueblo* situation but to all other disputes arising under the *Armistice Agreement.*

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continues indefinitely. . . . In this respect is it more like a treaty of peace than an armistice." 1955 PROC. AM. SOC'Y INT'L L. 98.

[4] N.Y. Times, Jan. 27, 1968, at 6, col. 1.

[5] Morrison, *International Law and the Seizure of the USS Pueblo,* 4 TEXAS INT'L L. F. 187 (1968).

[6] Levie, *The Nature and Scope of the Armistice Agreement,* 50 AM. J. INT'L L. 880 at 884 (1956) [hereafter cited as Levie].

[7] *See* J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT, 644 n. 42a (2d rev. ed. 1959).

[8] *See* M. TAMKOC, POLITICAL AND LEGAL ASPECTS OF ARMISTICE STATUS 47 (1963).

B. *SIGNIFICANCE OF THE INVESTIGATION*

Much scholarly writing has been published about the legal status of the United Nations forces in Korea,[9] the armistice negotiations,[10] and the treatment of prisoners of war,[11] but no material is available on the current legal status of the *Armistice Agreement* in terms of an analysis of the legal problems that have arisen in the light of current state practice.

In 1954, Philip C. Jessup first recommended the recognition of a "third legal status intermediate between war and peace."[12] In 1955, Professor Myres S. McDougal wrote a short editorial comment in which he expressed dissatisfaction with the dichotomy between war and peace. He suggested the possible utility of analyzing the armistice period in terms of a whole series of factual situations ranged on a scale according to intensity of conflict, with corresponding legal consequences.[13] In 1963, Metic Tamkoc wrote the most detailed study on the political and legal aspects of modern armistice status.[14] His examination elaborated upon the suggestions of Jessup and McDougal.

In each of the above writings the author's attention was focused on the new developments in armistice status as a result of changed world conditions since the end of World War II. Tamkoc mentions the Korean Armistice, but only collaterally in support of his thesis. His approach is basically horizontal. No published information was found in which an attempt was made to analyze the implementation of the *Korean Armistice Agreement* in a comprehensive manner.

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[9] D. BOWETT, UNITED NATIONS FORCES: A LEGAL STUDY 29–60 (1964); YOO TAE-HO, THE KOREAN WAR AND THE UNITED NATIONS: A LEGAL AND DIPLOMATIC HISTORICAL STUDY (1964); Goldie, *Korea and the U.N.*, 1 U. BRITISH COLUMBIA LEGAL NOTES 125 (1950); Pye, *Legal Status of the Korean Hostilities*, 45 GEO. L. J. 45 (1956).

[10] C. JOY, HOW COMMUNISTS NEGOTIATE (1955) [hereafter cited as JOY]; W. VATCHER, PANMUNJOM: THE STORY OF THE KOREAN MILITARY ARMISTICE NEGOTIATIONS (1958).

[11] S. DAYAL, INDIA'S ROLE IN THE KOREAN QUESTION: A STUDY IN THE SETTLEMENT OF INTERNATIONAL DISPUTES UNDER THE UNITED NATIONS (1959); Charmatz & Wit, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 YALE L. J. 391 (1953); Mayda, *The Korean Repatriation Problem and International Law*, 47 AM. J. INT'L L. 414 (1953).

[12] Jessup, *Should International Law Recognize an Intermediate Status Between Peace and War?* 48 AM. J. INT'L L. 98 (1954) [hereafter cited as Jessup].

[13] McDougal, *Peace and War: Factual Continuum With Multiple Legal Consequences*, 49 AM. J. INT'L L. 63 (1955).

[14] M. TAMKOC, POLITICAL AND LEGAL ASPECTS OF ARMISTICE STATUS (1963).

C. *LIMITATIONS AND PROCEDURES*

The determination of the current legal status of the *Korean Armistice Agreement* was primarily a matter of screening the *Minutes of the Military Armistice Commission Meetings* in order to identify the problems which have arisen and to consider the reaction to these problems. The treatment of problem situations was then evaluated in terms of customary rules governing armistice status, the *Armistice Agreement*, and where appropriate the *Charter of the United Nations*.

D. *ORGANIZATIONAL PLAN*

The study begins with an examination of the military and political setting under which the armistice was negotiated. Next the scope of the *Armistice Agreement* is considered. Chapter IV is devoted to the settlement of disputes arising during the armistice. This is followed by an analysis of the treatment of specific incidents.

II. BACKGROUND—THE ARMISTICE NEGOTIATIONS

A convenient starting point for an inquiry into the current status of the Korean Armistice as a legal institution is the armistice negotiations, which began in July of 1951 and culminated in the agreement signed on 27 July 1953. This exercise in historical perspective is useful insofar as it reflects changed conditions in the international community which have resulted in totally different legal consequences flowing from armistice status, as compared with those flowing from the traditional rules of previous centuries.

A. *CUSTOMARY INTERNATIONAL LAW OF ARMISTICE*

The traditional rules governing armistice status are based upon the well-established dichotomy between war and peace. According to the dichotomous approach, nations are either at war or at peace, and there is no intermediate stage between the two.[15] It has even been declared a positive rule of international law that an "armistice does not terminate the state of war *de jure* or *de facto*."[16] As a corollary, "[T]he state of war continues to exist and to control the actions of neutrals as well as belligerents."[17] The conventional rules of armistice as codified by the *Hague Regulations* are based upon a conception of an armistice as a purely

[15] *See* Jessup, *supra* note 12, at 98.
[16] Levie, *supra* note 6, at 884.
[17] *Id.*

military convention between belligerents which prepares the groundwork for peace by providing an environment in which preliminary peace negotiations can be conducted.[18] The end in view is always the treaty of peace by means of which the relations between belligerent nations pass from a state of war to a state of peace.

Accordingly, the traditional approach views the relationship between the international law of war and that of peace as one between two totally different legal orders. The change in the concepts of war and peace brought about by the cold war makes such an "either–or" classification completely unsatisfactory.[19] On the other hand, the relationship between the international law of war and that of peace may be treated as one between the legal consequences that follow from facts which exist during war and those which exist during peace. When considered in this regard, it is the reaction to different facts and the corresponding effect on the legal rules which are significant.[20]

B. *THE MILITARY AND POLITICAL SITUATION*

The negotiators at Kaesong and Panmunjom were responding to three basic factors which were to influence the future course of the armistice and the relations between the opposing sides: (1) the absence of a military solution to the Korean question; (2) the absence of a political solution; and (3) the desire on the part of the Communist side to restore the status quo as it had existed prior to the war. These factors will be considered in turn.[21]

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[18] *See* Monaco, *Les Conventions Entre Belligerents*, 75 HAGUE ACADEMY OF INTERNATIONAL LAW RECUEIL DES COURS 277, 323 (1949) [hereafter cited as Monaco].

[19] *See* M. TAMKOC, POLITICAL ASPECTS OF ARMISTICE STATUS 47 (1963); Jessup, *supra* note 12, at 102–03; McDougal, *Peace and War: Factual Continuum With Multiple Legal Consequences*, 49 AM. J. INT'L L. 63 (1955). *Cf.* Yohuda, *The Inge-Toft Controversy*, 54 AM. J. INT'L L. 398, 400 (1960).

[20] *See* Monaco, *supra* note 18, at 279.

[21] These factors describe a political condition which seems close to the intermediate stage between peace and war hypothesized by Jessup. The characteristics of *intermediacy* proposed by Jessup are:

"First there would be between the opposing parties a basic condition of hostility and strain.

". . . .

"A second characteristic of intermediacy might be that the issues between the parties would be so fundamental and deep-rooted that no solution of a single tangible issue could terminate them.

". . . .

"The third characteristic would be an absence of intention . . . to resort to war as the means of solving the issues." Jessup, *supra* note 12, at 100.

1. *Military Situation.*

By the summer of 1951, the military situation had progressed to the point where neither side viewed a continuation of the fighting as a satisfactory means of achieving their respective political objectives. It should be recalled at this point that at the end of World War II Korea had been divided at the 38th parallel for surrender purposes only, the Russians to receive the surrender of Japanese forces north of that line and the United States to receive the surrender of forces south of that line. The objectives of the United States, and later of the United Nations, were the reunification of Korea as an independent state and the establishment of a national government based on free elections.[22]

On 25 June 1950, the Communists attacked across the 38th parallel in an attempt to enforce their regime on all of Korea. The invasion was based on the erroneous premise that the United States would not retaliate.[23] The sudden and unexpected response of United Nations forces made it obvious that the subjugation of South Korea could not be achieved by military force without unacceptable risks. When the successes of United Nations forces in 1951 made it apparent that the objectives of those forces were no longer limited to maintaining the integrity of the Republic of Korea, but extended to the liberation of North Korea as well, the Soviet Ambassador to the United Nations suggested the possibility of a truce based upon the 38th parallel.[24]

2. *Political Situation.*

The second factor to which the negotiators were responding was the absence of any immediate political solution to the Korean question. As early as 1947 the United Nations General Assembly had adopted a resolution calling for free elections and the establishment of an independent government. The Soviet Union opposed this resolution.[25] In the light of Soviet intransigence to any solution other than one which would insure Communist control for all Korea, there was little likelihood that any peace conference proposed by the *Armistice Agreement* would result in a peace treaty in the traditional sense.

3. *Desire to Restore the Status Quo.*

Once the Communists became convinced of the desirability of a

[22] *See* U.S. POLICY IN THE KOREAN CRISIS, DEP'T STATE PUBL. NO. 3922 (1950).

[23] *See* address by Secretary Dulles before American Legion, St. Louis, Mo., 2 Sep. 1953, 29 DEP'T STATE BULL. 339 (1953).

[24] JOY, *supra* note 10, at 1.

[25] 1947–48 YEARBOOK OF THE UNITED NATIONS 81–88.

cease-fire, they attempted to restore the status quo as it had existed prior to the outbreak of hostilities. The agenda proposed by the Communists called for (1) the establishment of the 38th parallel as the Military Demarcation Line; and (2) the withdrawal of all armed forces of foreign countries from South Korea.[26] The military significance of these proposals is reflected in the situation as it then existed. The line of ground contact was anchored just south of the 38th parallel on the West and well north of the 38th parallel on the East. This line afforded United Nations forces strong defensive positions while the 38th parallel did not.[27]

Although the agenda as adopted did not contain the Communist proposals, it is obvious that they were intended to achieve a so-called armistice that would have merely reestablished the status quo as it existed prior to 25 June 1950.

The negotiations also provided a preview of Communist intentions as to the manner in which the *Armistice Agreement* would be implemented. Once an armistice is concluded, one of the major considerations is to minimize the probability of the resumption of hostilities. It is therefore necessary to establish consultative machinery with adequate supervisory and enforcement powers to carry out the prescriptions of the agreement.[28] With this end in mind the United Nations Command proposed elaborate supervisory organs and recommended aerial reconnaissance as one of the single most effective means of armistice supervision. The Communists categorically rejected the use of aerial reconnaissance. The United Nations Command yielded on this point to instructions from Washington.[29]

In response to the use of aerial reconnaissance, the Communists offered a counterproposal that would have required unanimous agreement among the members of the various supervisory organs as a prerequisite to any action. They also insisted that Neutral Nations Observer Teams in the ports of entry be allowed to inspect every detail of military equipment introduced into Korea. Such a method of inspection would have exposed vital military secrets to the Czechoslovak and Polish members of the inspection teams. Both of the above points were conceded to the United Nations Command, but at the expense of severe limitations on the freedom and effectiveness of the inspection teams.[30]

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[26] JOY, *supra* note 10 at 19.
[27] *Id.* at 24.
[28] *See* Monaco, *supra* note 18, at 343.
[29] JOY, *supra* note 10, at 88.
[30] *Id.* at 100.

C. SUMMARY

The military and political conditions under which the armistice was negotiated support the conclusion that the Communists genuinely desired a cease-fire. In retrospect, however, it is apparent from an analysis of the factors discussed in this section that any armistice contemplated by the Communists did not have for its purpose the establishment of conditions conducive to the preliminaries of peace in the traditional sense.

III. SCOPE OF THE ARMISTICE AGREEMENT

The purposes of this section are (1) to examine the nature and scope of the *Korean Armistice Agreement;* (2) to identify those characteristics which distinguish the *Korean Armistice Agreement* from armistices of the past; and (3) to draw generalizations based upon these distinctions.

A. MATTERS STIPULATED IN THE KOREAN ARMISTICE AGREEMENT

The Law of Land Warfare provides that the following matters should be stipulated in an armistice:

a. Precise Date, Day, and Hour of Commencement of the Armistice.

b. Duration of the Armistice.

c. Principal Lines and all Other Marks or Signs Necessary to Determine the Locations of the Belligerent Troops.

d. Relation of the Armies With the Local Inhabitants.

e. Acts to be Prohibited During the Armistice.

f. Disposition of Prisoners of War.

g. Consultative Machinery.[31]

In addition, it is further provided that various political stipulations may also be incorporated into general armistices. The above stipulations will be used as a framework for examining the scope of the *Korean Armistice Agreement.*

1. *Precise Date, Day, and Hour of Commencement of the Armistice.*

According to the customary rules of international law an armistice becomes binding on the belligerents at the time of its signing, in the absence of a stipulation to the contrary.[32] Subordinate

[31] U.S. DEP'T OF ARMY, FIELD MANUAL 27–10, LAW OF LAND WARFARE ¶ 487 (1956) [hereafter cited as FM 27–10].

[32] 2 L. OPPENHEIM, INTERNATIONAL LAW § 238 (6th rev. ed. H. Lauterpacht 1944) [hereafter cited as OPPENHEIM].

officers, however, are not responsible for respecting the armistice until they have received notification.[33] The *Korean Armistice Agreement* obviated potential problems in this respect by the stipulation of an effective date and time for the cessation of all hostilities by all armed forces under the control of the commanders of the opposing sides, "including all units and personnel on the ground, naval and air forces . . . ."[34] Paragraph 12 specifies that the cessation of hostilities shall be effective twelve hours after the Agreement is signed. All other provisions of the Agreement became effective as of 2000 hours on 27 July 1953.[35] In effect, all provisions became effective as of the latter time, since the Agreement was executed at 1000 hours on 27 July 1953.

2. *Duration of the Armistice.*

Where the Agreement specifies no particular period, it remains in effect until notice of a resumption of hostilities has been communicated to the opposing side.[36] The *Korean Armistice Agreement* specifies no particular duration, but paragraph 62 stipulates that the "agreement shall remain in effect until expressly superseded either by mutually acceptable amendments and additions or by provision in an appropriate agreement for a peaceful settlement at a political level between both sides."[37] This provision can be construed to preclude the right of either party to resume hostilities. Such a construction gives a modern armistice a permanency that distinguishes it from the temporary armistices of the past. It can be argued that paragraph 62 means that the Korean Armistice is to "remain in effect as long as the parties do not agree to exchange it for one of real peaceful relations."[38] It is primarily for the above reasons that the modern armistice agreement has been compared "to the preliminaries of peace . . . and even to a definitive treaty of peace."[39]

3. *Principal Lines and all Other Marks or Signs Necessary to Determine the Location of Belligerent Troops.*

Article I of the *Korean Armistice Agreement* establishes both a Military Demarcation Line and a Demilitarized Zone. The Military Demarcation Line was fixed generally along the line of ground

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[33] *Id.*; FM 27-10, ¶ 491.
[34] Korean Armistice Agreement, T.I.A.S. No. 2782, art. II, ¶ 12.
[35] *Id.*, art. V, ¶ 63.
[36] OPPENHEIM, *supra* note 32, at § 240; Levie, *supra* note 6, at 892.
[37] T.I.A.S. No. 2782, art. V.
[38] *Cf.* Yohuda, *The Inge-Toft Controversy*, 54 AM. J. INT'L L. 398, 401 (1960).
[39] Levie, *supra* note 6, at 881.

contact when the Agreement was signed.[40] The Demilitarized Zone, or buffer zone, was established by northern and southern boundaries drawn two kilometers respectively from the Military Demarcation Line.

4. *Relation of the Armies with the Local Inhabitants.*

The *Korean Armistice Agreement* did not provide for a resumption of commercial intercourse between the populations of the opposing sides, and, therefore, commercial relations remain suspended. Three paragraphs, however, do deal with civil administration and the displacement of civilians. These paragraphs comprise the principal political stipulations of the Agreement.

a. Control of civil shipping in the Han River Estuary. Paragraph 5 provides for the control of civil shipping in the Han River Estuary. Specifically, the Estuary is open to the "civil shipping of both sides wherever one bank is controlled by one side and the other bank is controlled by the other side."[41] The Military Armistice Commission is given authority to prescribe rules and has prescribed rules to govern civil shipping in designated areas of the Estuary.[42]

b. Civil and administrative relief within the Demilitarized Zone, Paragraph 10 places the responsibility for civil administration and relief in the Demilitarized Zone with the respective commanders of both sides. That part of the zone south of the Military Demarcation Line is the responsibility of the Commander in Chief, United Nations Command, and that part of the zone north of the Military Demarcation Line is the joint responsibility of the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers.

c. Displacement of civilians. Paragraph 59 contains provisions for the resettlement of civilians who were displaced by the war. All civilians who resided south of the Military Demarcation Line at the start of the fighting and who were located in territory controlled by the Korean People's Army and the Chinese People's Volunteers at the time of the armistice were allowed to return to their homes south of the line if they so desired. Likewise, displaced persons south of the Military Demarcation Line were allowed to return to their homes north of the line. A special committee was established to assist the return of displaced persons.

[40] JOY, *supra* note 10, at 59.
[41] T.I.A.S. No. 2782, art. I, ¶ 5.
[42] Minutes, Military Armistice Commission Meetings, 22d meeting, Oct. 1953 [hereafter cited as M.A.C., (number) meeting, (date)].

5. *Acts to be Prohibited During the Armistice.*

a. Customary rules. One of the more frequent problems which arose under armistices of the past was the determination of what acts are prohibited and what acts are allowed.[43] In the absence of stipulations the weight of authority is "that belligerents during an armistice may, *outside the line where the forces face each other*, do everything and anything they like regarding defense and preparation of offense . . . ."[44] In practice states have refrained only from acts expressly prohibited.[45]

The Law of Land Warfare provides:

> In the absence of stipulations to the contrary, each belligerent is authorized to make movements of troops within his own lines, to receive reinforcements, to construct new fortifications, installations and bases, to build and repair transportation and communications facilities, to seek information about the enemy, to bring up supplies and equipment, and, in general to take advantage of the time and means at his disposal to prepare for resuming hostilities.[46]

b. Stipulations in the Korean Armistice Agreement.

(1) *Cessation of all hostilities.* The most sweeping prohibition in the *Korean Armistice Agreement* is the stipulation calling for a complete cessation of all hostilities in Korea by all ground, naval, and air forces under the control of the commanders of the opposing sides.[47] Since a true armistice must maintain the balance of power for the armed forces of both sides, with a view toward reducing the likelihood of a resumption of hostilities, however, additional stipulations were added.

(2) *Rotation of military personnel and equipment.* The principal arrangements for insuring the stability of the cease-fire are contained in paragraphs 13*c* and *d*. Paragraph 13*c* requires the commanders of both sides to stop the introduction into Korea of reinforcing military personnel. Paragraph 13*d* requires the commanders of both sides to cease the introduction into Korea of reinforcing combat aircraft, armored vehicles, weapons, and ammunition.

In spite of the worthy objectives of paragraph 13*c* and *d*, it will subsequently be shown that violations by the Communist side caused the United Nations Command to consider the provisions as no longer binding. These prohibitions were obviously intended to apply only for a limited period of time. They were drafted with

[43] Levie, *supra* note 6, at 886.
[44] OPPENHEIM, *supra* note 32, at § 237.
[45] Levie, *supra* note 6, at 886.
[46] FM 27–10, ¶ 487*c*.
[47] T.I.A.S. No. 2782, art. II, ¶ 12.

the expectation that the armistice would soon be replaced by a political settlement on a higher level. When the Geneva Conference of 1954 failed to achieve the desired political settlement, it became unrealistic to assume that military equipment which was destroyed, damaged, or worn out would be replaced on a piece-for-piece basis with equipment of the same type and effectiveness over a long period of time.

6. *Disposition of Prisoners of War.*

The exchange of prisoners of war was the single greatest stumbling block to the speedy execution of the *Armistice Agreement.* For over a year the Communist side refused to accede to the principle of "no forced repatriation" nor to the process of screening prisoners to determine whether or not they desired to return to their side of origin.[48]

Eventually the United Nations Command prevailed. Paragraphs 51–58 and the Annex to the *Korean Armistice Agreement* contain detailed provisions for the disposition of prisoners of war. These provisions applied only to prisoners captured prior to the armistice. No provision was made for the treatment of personnel captured during the armistice period itself.

7. *Consultative Machinery.*

The following organs were established to implement the *Korean Armistice Agreement:* (1) a Military Armistice Commission; (2) a neutral Nations Supervisory Commission; (3) a Commission for the Repatriation of Prisoners of War; (4) Joint Red Cross Teams; (5) a Committee for Assisting the Return of Displaced Persons; and (6) a Neutral Nations Repatriation Commission.

With the exception of the Military Armistice Commission and the Neutral Nations Repatriation Commission, all of the other organs were dissolved upon completion of their respective missions. Because of the opposition of the Czechoslovak and Polish members and the violations of paragraphs 13*c* and *d* by the Communist side, the Neutral Nations Inspection Teams were ultimately withdrawn to Panmunjom.[49] The Neutral Nations Supervisory Commission has remained moribund since that time. Consequently, the only commission set up by the *Armistice Agreement* that is still viable is the Military Armistice Commission.

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[48] JOY, *supra* note 10, at 59.

[49] *Report of Unified Command on Neutral Nations' Supervisory Commission in Korea,* U.N. Doc. A/3167 (1956), 1956 YEARBOOK OF THE UNITED NATIONS 128.

8. *Political Conference.*

The only stipulation of a political nature not previously discussed is paragraph 60 of the *Armistice Agreement,* which is a recommendation to the governments of both sides that "within three (3) months after the *Armistice Agreement* is signed and becomes effective, a political conference on a higher level of both sides be held by representatives appointed respectively to settle through negotiation the questions of the withdrawal of all foreign forces from Korea, the peaceful settlement of the Korean question, etc."[50]

B. *SUMMARY*

Examination of the nature and scope of the *Korean Armistice Agreement* reveals that its "conditions and terms are intended to be purely military in character. . . ."[51] A fair construction of the Agreement, however, supports the conclusion that the customary rule of international law, which reserves the right of either belligerent to resume hostilities, is inapplicable to the Korean Armistice.

IV. SETTLEMENT OF DISPUTES ARISING DURING THE ARMISTICE

The purposes of this section are (1) to consider the organization and functions of the supervisory organs established by the *Korean Armistice Agreement;* (2) to evaluate the effectiveness of these supervisory organs; and (3) to consider the permissible range of options available under the customary rules of international law for the handling of disputes during the armistice period.

A. *THE MILITARY ARMISTICE COMMISSION*

The most important organ created by the *Armistice Agreement* is the Military Armistice Commission, whose mission is to supervise the implementation of the *Armistice Agreement* in all of its particulars and to settle all alleged violations by negotiation.

1. *Composition and Functions.*

The Commission is composed of ten senior members, five of whom are appointed by the United Nations Command, and five of whom are appointed jointly by the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers.[52]

[50] T.I.A.S. No. 2782, art IV, ¶ 60.
[51] *Id., Preamble.*
[52] *Id.,* art II, ¶ 20.

The Commission supervises the armistice by observation, inspection, and investigation. The Commission performs these functions through Joint Observer Teams and through the Neutral Nations Supervisory Commission.[53] The functions of the latter two organs complement each other and provide a comprehensive scheme for the investigation of violations reported to have occurred any place in Korea. The responsibility of the Joint Observer Teams is limited to the Demilitarized Zone and the Han River Estuary.[54] Investigation at any place outside the Demilitarized Zone where violations are reported to have occurred is the responsibility of the Neutral Nations Supervisory Commission.[55]

The stated purpose of the Military Armistice Commission—to supervise the implementation of the *Armistice Agreement*—was soon "overshadowed by [Communist] propaganda. . . ."[56] To date only two alleged violations reported by the United Nations Commands have been admitted by the Communist side. This occurred at the ninth meeting of the Commission on 8 August 1953, when the senior member of the Korean People's Army and the Chinese People's Volunteers admitted that two men in a detail removing communication wire from the Demilitarized Zone had crossed the Military Demarcation Line by mistake.[57] With the exception of this admission the Communist side has uniformly denied all allegations, or as is more often the case, have simply ignored the charges of the United Nations Command.

In the main the Military Armistice Commission has proved to be an ineffective forum for settling disputes through negotiation. However, much has been accomplished by the staffs of the respective sides, where the opportunity for propaganda is minimal.[58]

2. *Joint Observer Teams.*

The *Armistice Agreement* provided for the initial establishment of ten Joint Observer Teams, to be composed of not less than four nor more than six field grade officers, half of whom were to be appointed by each side.[59] In its first meeting, the Military Armistice Commission agreed upon three field grade officers

[53] *Id.*, art. II, ¶¶ 23, 28.
[54] *Id.*, art. II ¶ 26.
[55] *Id.*, art. II, ¶ 28.
[56] TIME, 2 Jul. 1965, at 19.
[57] M.A.C., 9th meeting, 8 Aug. 1953.
[58] M.A.C., 2d meeting, 29 Jul. 1953 (rules for civil shipping in the Han River Estuary and related matters); M.A.C., 6th meeting, 3 Aug 1953 (movement of civilian residents of Demilitarized Zone); M.A.C., 65th meeting, 21 Aug. 1955 (return of pilots shot down over North Korea); M.A.C., 82d meeting, 10 Mar. 1958 (return of aircraft wreckage).
[59] T.I.A.S. No. 2782, art. II, ¶ 23.

from each side to constitute each Joint Observer Team. The Demilitarized Zone and the Han River Estuary were divided into ten zones, with one Joint Observer Team for each sector.[60] The number of teams was subsequently reduced from ten to seven on the recommendation of the United Nations Command.[61]

The *Armistice Agreement* provides that Joint Observer Teams may be dispatched by the Military Armistice Commission, or by the senior member of either side thereof.[62] In actual practice only certain types of alleged violations have resulted in satisfactory investigations. For example, in the eleventh meeting of the Military Armistice Commission, the United Nations Command charged that the Communist side was constructing a fortification within their half of the Demilitarized Zone.[63] A Joint Observer Team was dispatched, completed an investigation, and reported that no fortification nor evidence of construction was found. The United Nations Command conceded that the point had been satisfactorily dealt with.[64] Such examples are rare.

By far the majority of reported incidents do not lend themselves to investigation, because evidence either is unavailable, is fabricated for the purpose of propaganda,[65] or is peculiarly within the knowledge of one side or the other. Consequently, the practice has been for one side or the other to make an allegation of violations to the Military Armistice Commission. *Ex parte* investigations are then conducted, and, depending upon the results, the allegations are admitted, denied, or ignored.

B. *THE NEUTRAL NATIONS SUPERVISORY COMMISSION*

While the Military Armistice Commission is ranked first among the supervisory organs in relative importance because of its overall responsibility, the Neutral Nations Supervisory Commission is the most important from the practical standpoint. Theoretically, at least, the Commission was to be composed of representatives of nations which were genuinely neutral and who, it was hoped, would police the armistice with complete impartiality.[66]

[60] M.A.C., 1st meeting, 28 Jul. 1953.
[61] M.A.C., 35th meeting, 10 Jan. 1954.
[62] T.I.A.S. No. 2782, art. II, ¶ 28.
[63] M.A.C., 11th meeting, 13 Aug. 1953.
[64] M.A.C., 12th meeting, 19 Aug. 1953.
[65] In one instance there was strong evidence that the Communist side murdered six of their own personnel and attempted to create an incident by placing their bodies within the Demilitarized Zone. M.A.C., 58th meeting, 25 May 1955.
[66] JOY, *supra* note 10, at 90.

What appeared to be an effective means of supervision in theory was not borne out in actual practice. The gap between conception and execution was never effectively bridged, primarily because the Czechoslovak and Polish members of the Commission were influenced by and supported the position of the North Korean and Communist Chinese members of the Military Armistice Commission.[67] Czechoslovakia and Poland were neutral only in the sense that they were not active participants in the Korean hostilities. While it could be argued that the subsequent failure of the Neutral Nations Supervisory Commission was due to inadequate terms of reference, in that each side exercised a virtual veto over the other, the fact remains that successful functioning of the Commission was predicated upon the strict neutrality of all members, and good faith on the part of the Communist side in facilitating free and open investigation. Without these latter two ingredients, no system could have been effective.

1. *Composition and Functions.*

The Commission is composed of two senior officers appointed by Sweden and Switzerland, who were nominated as neutral nations by the Commander in Chief, United Nations Command, and by two senior officers appointed by Czechoslovakia and Poland, who were nominated by the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers.[68]

The function of the Commission is two-fold. First, it is charged with supervising the rotation of personnel and units, and the replacement of combat material as stipulated in paragraphs 13*c* and *d* of the *Armistice Agreement*. Second, it is charged with conducting inspections of violations of the *Armistice Agreement* that are alleged to have occurred outside the Demilitarized Zone.[69]

2. *Neutral Nations Inspection Teams.*

a. Permanent teams. The first part of the Commission's dual role was to be accomplished through the use of Neutral Nations Inspection Teams permanently stationed at specified ports of entry.[70] Initially, five Inspection Teams were stationed at ports under military control of the Communist side, and five Inspection Teams were stationed at ports under the military control of the

[67] Letter from Major General Lacey, Senior U.S. Representative, Military Armistice Commission in Korea, to the Neutral Nations' Supervisory Commission, 15 Apr. 1954, in 30 DEP'T STATE BULL. 689, 690 (1954).
[68] T.I.A.S. No. 2782, art II, ¶37.
[69] *Id.*, art. II, ¶¶ 41–42.
[70] *Id.*, art. II, ¶¶ 42–43.

United Nations Command. All outgoing and incoming combat personnel and equipment were required to be introduced into and evacuated from Korea only through the specified ports.[71]

In the South the Inspection Teams controlled the inspection of all incoming and outgoing military personnel and combat materiel through well-established procedures. The teams in the South freely conducted on-the-spot inspections in addition to checking ship and load manifests furnished to them by the United Nations Command.[72]

By contrast, the teams in the North had no established system. For the first six months of the armistice the Communist side submitted no reports of any incoming combat materiel. The first combat materiel report, which was submitted on 6 October 1953, reflected that four 57 mm anti-tank guns and 20 rounds of ammunition had been shipped out of Korea. The first combat personnel report, submitted on 12 September 1953, purported to show that there were no personnel rotations for a seventeen-week period, despite the fact that the Communists had a military force in excess of a million men, most of whom had come from Communist China.[73]

The reports of the Communists prompted the senior Swiss member of the Neutral Nations Supervisory Commission to comment, "I think we have the right to ask ourselves how it is possible that an Army counting several one hundred thousand soldiers can be logistically supported by the amount of materiel as shown by the figures which are being submitted to us.[74]

In addition to not reporting personnel rotations and combat materiel replacement, as required by paragraphs 13*c* and *d* of the *Armistice Agreement*, there was evidence that the movement of incoming personnel and materiel were not limited to designated ports of entry in the North. At one port a railroad bypass was constructed. Within the designated ports of entry inspection activities were restricted to the vanishing point by the scheduling of inspections at unreasonable hours and by the failure to give sufficient advance notice of train movements to permit inspections.[75]

b. Mobile teams.

The second part of the Commission's dual role, that of inspect-

[71] *Id.*, art. II, ¶¶ 13*c*, *d*.
[72] M.A.C., 60th meeting, 5 Jul. 1955.
[73] *Id.*
[74] *Id.*
[75] M.A.C., 70th meeting, 31 May 1956.

ing reported violations of the *Armistice Agreement* outside of the Demilitarized Zone, was to be accomplished by twenty mobile inspection teams. According to the terms of reference under which the teams were to operate, investigations could be requested either by the Military Armistice Commission or by the senior member of either side on the Military Armistice Commission.[76] This latter provision meant that either side could request that teams be dispatched to investigate reported violations in territory controlled by the other side without advance agreement by the opposing side.

In practice, the Czechoslovak and Polish members of the Neutral Nations Supervisory Commission exercised their veto to block investigations unilaterally requested by the United Nations Command on five separate occasions.

On 29 June 1953, the United Nations Command requested an investigation into the case of three soldiers who had entered the joint security area around Panmunjom and sought refuge in a sentry box belonging to the United Nations Command.[77] Preliminary investigation supported their allegations that they were Republic of Korea soldiers who had been captured and forcibly impressed into the service of the Korean People's Army. If true, the results of the preliminary investigation were evidence of a violation of the *Armistice Agreement*, since it had been previously reported that all prisoners of war who had insisted upon repatriation had been returned to their side of origin. For obvious reasons, the Czechoslovak and Polish members refused to order a joint investigation.[78]

Similar investigations with respect to other individuals were unilaterally requested by the United Nations Command on three subsequent occasions, with similar results.[79]

In the 96th meeting of the Neutral Nations Supervisory Commission it became obvious that there would be no further investigations relating to the forcible detention of captured personnel. The Polish delegation stated:

> [I]t will not agree—either now or in the future—to a request of one of the sides to conduct any investigation in connection with the issue of retention of captured personnel on either side—until settlement or understanding is reached on the matter by the two opposing sides or by the forthcoming political conference.[80]

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[76] T.I.A.S. No. 2782, art. II, ¶ 28.
[77] M.A.C., 29th meeting, 21 Nov. 1953.
[78] Letter from Major General Lacey, *supra* note 67, at 689.
[79] *Id.*
[80] *Id.* at 690.

The subject of the fifth refusal to conduct an investigation at the request of the United Nations Command concerned the alleged illegal introduction of combat aircraft into the North in violation of paragraph 13*d* of the Armistice Agreement.[81]

Not all requests for investigations were refused, but in those cases where investigations were conducted, they were rendered ineffective by obstructionist tactics and restrictions imposed by the Czechoslovak and Polish members on the inspection teams. One of the clearest examples of this was in connection with the introduction of combat aircraft into the North.[82] As of 27 July 1953, intelligence had established that there were no aircraft and no usable airfields in territory under Communist control. Soon after the armistice became effective, radar detected the presence of combat aircraft in the North. This evidence was later corroborated by defectors who surrendered Soviet-built combat aircraft at airfields in the South.[83]

In each case where a mobile inspection team was dispatched to investigate the alleged illegal introduction of aircraft, its mission was frustrated by a variety of means. Defectors furnished information on how evidence was concealed or removed. This information formed the basis for the following charges by the senior delegate of the United Nations Command in the 60th meeting of the Military Armistice Commission:

> Your side flew many combat aircraft away from the inspected air fields.
>
> Your side hid combat aircraft in ravines in the hills in the vicinity of the airfields and camouflaged them.
>
> Your side dismantled some of the aircraft and concealed them.
>
> Your side stationed heavy guards about the hiding places and prevented inspections of these areas by the Mobile Inspection Teams.
>
> Your side arbitrarily reduced the boundaries of the airfields, thereby restricting the scope of the Mobile Inspection Teams Inspection.
>
> Your side prepared false testimony by long, detailed coaching of probable witnesses and by substituting politically indoctrinated, higher ranking officers for lower ranking officers by switching insignia.
>
> Your side delayed the assembly of newly arrived combat aircraft at Taechon by leaving them in their crates until the Mobile Inspection Team investigations were completed.[84]

Requests for documents by the Swiss and Swedish members of

[81] *Id.*
[82] M.A.C., 60th meeting, 5 Jul. 1955.
[83] *Id.*
[84] *Id.*

the inspection teams were routinely vetoed by the Czechoslovak and Polish members on the pretext that they were secret.[85]

3. *Suspension of Functions.*

The continual frustration of the mission of the Neutral Nations Supervisory Commission caused the Swiss and Swedish Governments in January of 1955 to recommend the abolition of the Commission, or in the alternative to reduce its size significantly.[86] The United States agreed in principle with the recommendation that the Commission be terminated.[87]

The Communist side rejected the abolition of the Commission, but agreed instead to the alternative proposal calling for a reduction in size.[88] Consequently, the number of inspection teams in the ports of entry was reduced from ten to six.[89]

On 31 May 1956 the United Nations Command notified the Communists that it would provisionally suspend the operations of the Neutral Nations Commission and the inspection teams in the South during the time that the Communist side continued in default of paragraphs 13*c* and *d* of the *Armistice Agreement*.[90]

The activities of the inspection teams in the North and South were suspended on 9 June 1956. All teams returned to Panmunjom by 11 April 1956.[91]

C. *OPTIONS AVAILABLE UNDER CUSTOMARY INTERNATIONAL LAW*

The withdrawal of the Neutral Nations Inspection Teams to Panmunjom marked the end of any effective supervision under the terms of the *Armistice Agreement*. The ineffectiveness of the supervisory organs established by the Agreement, coupled with the increased violations from the North, beginning in the latter part of 1966, has necessitated a fresh look at the alternatives available with customary international law. Two courses of action —(1) denunciation of the Agreement and (2) the use of force— will be considered.

1. *Denunciation of the Agreement.*

Under the *Hague Regulations* and *The Law of Land Warfare*, "Any serious violation of the armistice by one of the parties gives

[85] *Id.*
[86] Dep't of State Statement, 23 Feb. 1955, 32 DEP'T STATE BULL. 429 (1955).
[87] *Id.*
[88] *Id.*
[89] *See* 11 CHRONOLOGY OF INTERNATIONAL EVENTS 465 (1955).
[90] *Report of Unified Command on Neutral Nation's Supervisory Commission in Korea, supra* note 49.
[91] *Id.*

the other party the right of denouncing it, and even, in case of urgency, of recommencing hostilities immediately." [92] It is necessary at the outset to distinguish the right of denunciation from the right of recommencing hostilities, a distinction that has not always been recognized.[93]

a. Unilateral denunciation. It seems to follow from the customary rules governing armistice status that a serious violation by one party gives the other party at least the right of denouncing it, irrespective of whether or not that party has a right to recommence hostilities. Article 40 of the *Hague Regulations* leaves open the question as to who determines the seriousness of a violation. Theoretically this is left for each belligerent to decide.[94]

The right of unilateral termination does not necessarily follow if the rules that apply to international agreements generally are applied to armistices. The statements of writers and diplomats, and the weight of opinion in the United States as expressed in court decisions, support the position that such a right exists.[95] Nevertheless, it is safe to say that the right has not received recognition in the practice of states in the international community.[96]

Conceding the right of either side to denounce the *Korean Armistice Agreement,* it is submitted that there is ample justification for the United Nations Command to do so because of the gravity of the violations on the part of the Communist side.

b. Who may denounce the Agreement. A second legal question which arises in connection with the *Korean Armistice Agreement* is: Who may denounce the Agreement? The question arises because the Agreement is a collective convention, signed by multiple parties on both sides. Monaco argues that an armistice is always considered to be a bilateral, rather than multilateral agreement, and therefore there must be an agreement among allies as to who is authorized to act for the group.[97]

In passing the resolution calling for collective action in Korea, the Security Council of the United Nations recommended that all members providing military forces make them available to a uni-

[92] Hague Convention No. IV Respecting the Laws and Customs of War on Land, 18 Oct. 1907, Annex, art. 40, 36 Stat. 2277, T.S. No. 539 [hereafter cited as H.R.]; FM 27–10, ¶ 492.

[93] *See* OPPENHEIM, *supra* note 32, at § 239.

[94] Monaco, *supra* note 18, at 337.

[95] 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 342–46 (1943).

[96] *Id.*

[97] Monaco, *supra* note 18, at 327.

fied command under the United States.[98] It would therefore appear that the United States is authorized to act for its allies in effecting any alteration or termination of the Agreement. In practice, the United States has consulted with its allies prior to making any decision which had the effect of altering the *Armistice Agreement*.[99]

c. Resumption of hostilities. The right to recommence hostilities must be considered in light of the legal limits imposed by the *United Nations Charter*. The most significant limitation is contained in Article 2, paragraph 4, which provides that members shall refrain from the threat or use of force in the settlement of international disputes.[100] There are two exceptions to this principle: (1) Article 51 preserves the inherent right of individual or collective self-defense in the case of armed attack; [101] (2) Chapter VII provides for collective action of the United Nations to deal with serious threats or breaches of international peace and security.[102] In any event where disputes cannot be settled by peaceful means, members are obligated to submit disputes likely to endanger international peace to the Security Council.[103]

It is submitted that notwithstanding the *Hague Regulations* any use of force by the United Nations Command must be brought within the legal limits established by the *United Nations Charter*. In keeping with the charter provisions for collective self-defense and as further deterrents to aggression on the part of the Communist side, the United States has concluded a security treaty with the Republic of Korea.[104] Serious threats to the stability of the armistice have been brought to the attention of the Security Council.[105]

2. *Force Short of a Resumption of Hostilities.*

To what extent may local commanders in Korea react to illegal acts by the opposite side? Such reaction could range from self-defense to reprisals. The *Korean Armistice Agreement* furnishes little guidance, since it contemplates a complete cessation of hos-

[98] 5 U.N. GAOR, Supp. 2, at 25 (1950). The resolution was adopted by the Security Council on 7 July 1950, 5 U.N. SCOR, 476th meeting 3–4, 8 (1950).
[99] *Report of Unified Command on Neutral Nation's Supervisory Commission in Korea, supra* note 49.
[100] U.N. CHARTER.
[101] *Id.*
[102] *Id.*
[103] *Id.*, art. 37, ¶ 1.
[104] [1954] 5 U.S.T. 2368, T.I.A.S. No. 3097, 1 Oct. 1953.
[105] 22 U.N. SCOR, Supp., Oct.–Dec. 1967, at 197, U.N. Doc. S/8217 (1967); N.Y. Times, Jan. 27, 1968, at 6, col. 1.

tilities and is limited to the treatment of violations by invididuals.[106]

No citation of authority is necessary to support the proposition that local commanders can exercise the inherent right of self-defense. What is not clear is the extent to which immediate action may be taken to restore the equilibrium as it existed prior to the violation.

The resort to reprisals is subject to the same limitations of the *United Nations Charter* discussed above with respect to denunciation. It is difficult to envision justification for a reprisal except in the case of collective action by the United Nations under Chapter VII of the Charter.

One incident did occur in the operation of the armistice, which could be construed as a form of reprisal from a legal point of view. On 5 February 1955, MIG aircraft based in North Korea attacked United Nations Command aircraft over international waters. The United Nations sabre jets pursued the attacking MIG's and apparently downed two of them over coastal waters of North Korea.[107]

From a practical point of view the use of reprisals presents serious dangers to the maintenance of the armistice, and therefore cannot be sanctioned under the *United Nations Charter*. There is a great danger that a reprisal may be regarded as a denunciation of the *Armistice* Agreement and as a resumption of hostilities.[108]

D. *SUMMARY*

The elaborate supervisory machinery set up by the *Armistice Agreement* has failed to achieve the objectives set up in the Agreement for the settlement of disputes. The functionings of these organs have been frustrated to the point where the United States would be justified in terminating the Agreement, or in the alternative completely suspending its provisions. The permissible range of options available under customary international law for exerting pressure on the Communist side to induce them to refrain from violating the *Armistice Agreement* is severely limited by the *United Nations Charter*.

V. TREATMENT OF SPECIFIC INCIDENTS UNDER *THE ARMISTICE AGREEMENT*

The purposes of this section are (1) to analyze the legal problems that have arisen in the treatment of specific incidents during

[106] *See* T.I.A.S. No. 2782, art. II, ¶ 13*c*.
[107] M.A.C., 57th meeting, 26 Apr. 1955.
[108] *See* W. BISHOP, INTERNATIONAL LAW, CASES AND MATERIALS 746 (2d ed. 1962).

the armistice period, and (2) to identify and appraise any dissimilarities in the treatment of violations by ground, naval, and air forces.

A. *GROUND INCIDENTS*

The majority of violations of the Demilitarized Zone by ground forces have been perpetrated by individuals, patrols, and relatively small bands of infiltrators. Under the terms of paragraph 13*e* of the *Armistice Agreement* the senior commanders of both sides are obliged to "insure that all personnel of their respective commands who violate any of the provisions of the Armistice Agreement are adequately punished." [109] No distinction is made between the acts of private persons who act on their own responsibility and those who act under the instigation of opposing armed forces; no distinction is made between violators who remain under the control of their respective sides after violations and those who are captured by opposing forces; and no distinction is made between intentional and unintentional violations.

1. *Acts of Private Persons Versus Acts of Armed Forces.*

Article 41 of the *Hague Regulations* provides: "A violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand punishment of the offenders or, if necessary, compensation for the losses sustained." [110] *The Law of Land Warfare* defines a private individual as "any person, including a member of the armed forces, who acts on his own responsibility." [111]

The only significance that attaches to characterizing an individual violator a private person, as defined by *The Law of Land Warfare,* is that in such a case there is no right to denounce the armistice, regardless of the seriousness of the hostile acts committed. Violations by individual military personnel, however, may constitute a basis for denunciation if such violations are "committed with the knowledge and actual or tacit consent of their own government or commander. Consent may be inferred in the event of a persistent failure to punish such offenders." [112]

Violations by private persons do not give the opposing side the right of denunciation, because there must be a violation by one of the *parties,* that is to say by a *subject* of international law, as a condition precedent to denunciation and/or a resumption of hostil-

[109] T.I.A.S. No. 2782, art. II.
[110] H.R., art. 41.
[111] FM 27–10, ¶ 494(b).
[112] *Id.* at ¶ 494(c).

ities.[113] In those cases where violations are committed by individuals with the consent of their government, the responsibility for the violations is imputed to the belligerent with whose approval they are committed.

Most, if not all, of the serious violations by the Communist side have been committed by military personnel acting pursuant to military orders. While it is true that the more serious hostile acts have been committed by what were nominally guerrilla forces, the critical factor is that these forces were organized, equipped, and trained by the Korean People's Army.[114] Paragraph 12 of the *Armistice Agreement* provides: "The Commanders of the opposing sides shall order and enforce a complete cessation of all hostilities in Korea by *all* armed forces under their control . . . ." [115] This language is broad enough to include all guerrilla forces under the control of either side.[116]

The strongest evidence that North Korean infiltrators were acting under military control was the attempted assassination of South Korean President Chung Hee Park on 17 January 1968. A 31-man commando team, which had been organized and trained in North Korea, crossed the Demilitarized Zone wearing the utility military uniform of the Republic of Korea. Their mission was to behead the South Korean President. Only one member of the team, a lieutenant in the Korean People's Army, is known to have survived. He was captured and remains in the custody of the Republic of Korea. His testimony conclusively establishes the responsibility of the Korean People's Army for the mission.[117]

It is probably valid to conclude that paragraph 13*e* of the *Armistice Agreement* contemplates violations by private individuals only, and does not extend to violations by armed forces. In actual practice, the senior member of the aggrieved side has protested violations to the Military Armistice Commission. Where investigation has revealed responsibility on the part of individual violators under control of the United Nations Command, assurances have been given that immediate and positive steps will be taken to prevent a repetition, and that persons found to be responsible will be adequately punished. The Communist side has admitted

[113] *See* Monaco, *supra* note 18, at 339. Monaco does not treat hostile acts by individual acting on their own initiative as constituting violations of the armistice.

[114] Hubbell & Reed, *Mission: To Murder a President*, READER'S DIGEST, Jul. 1968, at 142.

[115] T.I.A.S. No. 2782, art. II (emphasis added).

[116] *See also* Levie, *supra* note 6, at 903.

[117] *See* Hubbell & Reed, *Mission: To Murder a President*, READER'S DIGEST, Jul, 1968, at 142.

and expressed regret for only two relatively minor violations in the early days of the armistice.[118]

2. *The Legal Status of Captured Members of Opposing Forces.*

Neither the *Armistice Agreement* nor the *Hague Regulations* contain any directions for the handling of individuals who are captured by opposing forces. *The Law of Land Warfare* provides that individual violations are punishable as war crimes.[119] It follows, therefore, that individual violators may be tried and sentenced to execution for war crimes, whether or not such individuals act on their own responsibility, as private persons, or as part of the opposing armed forces.

It can be concluded that personnel captured in the act of breaking the armistice are no longer entitled to treatment as prisoners of war.[120] Therefore, the transfer of captured personnel to the Republic of Korea by the United Nations Command in no way contravenes any rule of international law, even if the Geneva Conventions are deemed to apply to the armistice period. The sole responsibility of the United Nations Command in transferring custody of captured personnel to the Republic of Korea is to insure that the latter will not execute, imprison, or penalize such prisoners "without further judicial proceedings to determine what acts they have committed and what penalty should be imposed therefore [sic]." [121]

In actual practice both sides have returned captured personnel who have not committed hostile acts in territory under their respective control, except in cases where asylum has been requested and granted.[122]

3. *Intentional Versus Unintentional Violations.*

While paragraph 13*e* of the *Armistice Agreement* makes no distinction between intentional and unintentional violations, military personnel of the United Nations Command have been subjected to disciplinary action even where investigation has revealed accidental violations, such as navigational errors by pilots

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[118] M.A.C., 9th meeting, 8 Aug. 1953.

[119] FM 27–10, ¶ 494(c).

[120] *Cf.* J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 644–45 (2d rev. ed. 1959).

[121] FM 27–10, ¶ 71(d).

[122] On 21 Sep. 1953, a pilot officer of the Korean People's Army and the Chinese People's Volunteers surrendered a MIG–15 aircraft at a Republic of Korea airport. On 21 Jun. 1955, two members of the Korean People's Army surrendered a YAK–18 aircraft at Seoul Air Base. All requested and were granted asylum. M.A.C., 60th meeting, 5 Jul. 1955.

of aircraft.[123] It does not appear from the *Minutes of the Military Armistice Commission* what this action is. Presumably, punitive action is taken on the grounds of dereliction of duty or violation of orders.

According to *The Law of Land Warfare*, neither side is justified in resuming hostilities without "convincing proof of intentional and serious violation of its terms by the other party." [124] It is clear, therefore, that with respect to resumption of hostilities under the customary rules of armistice, there must not only be action by a subject of international law, but such action must be intentional.

B. *MARITIME INCIDENTS*

1. *Customary Rules.*

Most writers agree that in the absence of specific stipulations regulating the conduct of naval forces, the customary rules of armistice are that naval blockade may be continued, along with the rights of visitation and search, control over neutral vessels, seizure of contraband, and the taking of prizes.[125] The blockade in maritime warfare has been analogized to the siege in land warfare, so that blockades in existence at the time of the armistice are not required to be lifted without a special stipulation to the contrary.[126]

2. *Stipulations in the Korean Armistice Agreement.*

The *Korean Armistice Agreement* includes provisions which are designed to eliminate the difficulties that may arise under the customary rules of armistice applicable to maritime warfare.[127] Paragraph 12 requires a complete cessation of all hostilities, including naval forces. Paragraph 15 explicitly states:

> This Armistice Agreement shall apply to all opposing naval forces, which naval forces shall respect the waters contiguous to the Demilitarized Zone and to the land area under the military control of the opposing side, and shall not engage in blockade of any kind in Korea.[128]

Paragraph 15 uses the term "contiguous waters," and is silent as to the extent of these waters. In the armistice negotiations

[123] M.A.C., 7th meeting, 4 Aug. 1953; M.A.C., 35th meeting, 10 Jan. 1954; M.A.C., 54th meeting, 10 Feb. 1955; M.A.C., 65th meeting, 21 Aug. 1955; M.A.C. meeting, 10 Nov. 1956; M.A.C., 82d meeting, 10 Mar. 1958.

[124] FM 27–10, ¶ 493.

[125] *See* OPPENHEIM, *supra* note 32, at § 231; Levie, *supra* note 6, at 903–04.

[126] A. ROLIN, 2 LE DROIT MODERNE DE LA GUERRE §§ 801–10 (1920).

[127] Levie, *supra* note 6, at 905–06.

[128] T.I.A.S. No. 2782, art. II.

dealing with this point, an attempt was made to obtain agreement on the breadth of the territorial waters of North and South Korea. Agreement was not reached because of the divergent proposals of the United Nations Command, the Republic of Korea, and the Communist side. The United Nations Command suggested the traditional three-mile limit; the Republic of Korea established the "Rhee Line," which varied from 60 to 200 miles; and the Communists insisted upon the 12-mile limit, which has uniformly been claimed by Communist states.[129] In consonance with the underlying objectives of the armistice, the United Nations Command imposed a 12-mile limit on personnel under its control.[130] The Republic of Korea subsequently abolished the Rhee Line in a fisheries agreement concluded with Japan, but maintained that the line "would continue to exist for purposes of national security and the preservation of continental shelf resources." [131]

3. *Incidents Involving Fishing Vessels.*

Most of the incidents arising in the waters contiguous to North and South Korea have involved fishing vessels.[132] Technically such intrusions constitute violations of the armistice by private persons. Under customary rules the injured party is entitled to demand punishment of the offenders, and compensation for any losses.

The practice by the Communist side with respect to the intrusion of unarmed fishing boats into its coastal waters has not been consistent. The senior Communist members of the Military Armistice Commission have accepted in principle, at least, that fishing vessels and their crew should be returned if their intrusions were harmless.[133] On two occasions this was done. In response to a protest by the United Nations Command on 15 November 1957, the Communists replied that if investigation revealed that the 47 persons seized were *bona fide* fishermen, they would be released. Eight vessels and their crews were subsequently returned to South Korea.[134] On 8 July 1954, South Korean fishermen drifted into the waters of North Korea during a storm. North Koreans

[129] Levie, *supra* note 6, at 906.

[130] *Id.*

[131] Shigeru, *The Normalization of Relations Between Japan and the Republic of Korea*, 61 AM. J. INT'L L. 35, 54 (1967).

[132] *See e.g.*, 1967 New York Times (Index), *Korean War*, at 613.

[133] M.A.C., 83d meeting, 20 Mar. 1958.

[134] *Id.*

repaired their boats, salted their catch of fish, and assisted them in returning to South Korea.[135]

On other occasions defenseless fishing boats from the South have been subjected to hostile fire which cannot be justified under any rule of international law. One example will suffice. On 10 May 1955, North Korean shore batteries fired upon eight unarmed fishing boats. Five boats were sunk, and three were missing; six fishermen were killed, nine were wounded, and fifteen were missing.[136] Considered as a reprisal, the reaction was clearly disproportionate to the violation of the Demilitarized Zone. The Communists alleged self-defense, stating that warning signals had been given, but that armed vessels, disguised as fishing boats, mixed among the fishing boats and continued to approach the North Korean shore. There was no allegation of other hostile acts. The United Nations Command presented evidence that the fishermen did not fire a single round during the more than one hour that the vessels were subjected to the so-called defensive measures. The evidence further indicated that the fishermen were struggling to recover their nets while the shore batteries were firing over 800 rounds of heavy artillery.[137]

4. *Incidents Involving Naval Vessels.*

The first incident involving naval craft occurred in January 1967, when a South Korean patrol escort was sunk by North Korean shore batteries. The South Korean Defense Minister conceded that the boat had crossed three miles north of the Military Demarcation Line into North Korean waters and was attempting to escort 240 South Korean fishing boats back to South Korea. The patrol boat was four miles from the North Korean shore when fired upon.[138]

The second and more interesting maritime incident from the point of view of international law involved the seizure of the *U.S.S. Pueblo* in January 1968. The position of the United States was that the *Pueblo* was seized in international waters and that at no time had the *Pueblo* intruded into the territorial waters of North Korea.[139]

It has been shown that North Korea claims that her territorial sea extends 12 miles from the shoreline. The validity of this claim in international law is by no means settled, but it is not control-

[135] *Id.*
[136] M.A.C., 65th meeting, 21 Aug. 1955.
[137] M.A.C., 59th meeting, 14 Jun. 1955.
[138] N. Y. Times, Jan. 20, 1967, at 3, col. 6.
[139] N. Y. Times, Jan. 27, 1968, at 6, col. 1.

ling in this situation, since the United States agreed to respect North Korea's claim to 12 miles for the purposes of the armistice. It was conceded that the "instructions under which the *Pueblo* was operating required it to stay at least 13 nautical miles from the North Korean coast." [140]

The legality of the seizure depends upon whether or not the *Pueblo* was within 12 miles of the North Korean coast, a factual question which has never been satisfactorily settled. If the seizure occupied outside the 12-mile limit, it was a clear violation of international law. Assuming that the *Pueblo* was within the 12-mile limit, its very presence was a violation of the *Armistice Agreement* and its seizure was justified.

Two writers have examined the right of innocent passage to determine if this rule of international law would have permitted the *Pueblo* to navigate within the territorial waters of North Korea.[141] The authors reached opposite conclusions. In both cases it was assumed without argument that the rule establishing the right of innocent passage was applicable to the *Pueblo*. This line of reasoning completely ignores the existence of the *Armistice Agreement*, which is binding on both parties. The right of innocent passage is a rule which properly belongs to the international law of peace and which has no application to an armistice situation. It is submitted, therefore, that there are no rules of international law which would have permitted the *Pueblo* to navigate within the territorial sea of North Korea.

C. *AIRCRAFT INCIDENTS*

Protests over aircraft violations were made by the Communist side as early as the second meeting of the Military Armistice Commission on 29 July 1953.[142] Most of these overflights by United Nations aircraft occurred prior to effective marking of the Demilitarized Zone.[143] Even after marking, however, it was difficult for pilots to determine the exact location of the Demilitarized Zone from the air.[144]

In the 35th meeting of the Military Armistice Commission the senior member of the United Nations Command reported that of 116 violations alleged as of 3 January 1954, investigation had

[140] *Id.*

[141] Goldsmith, *The Pueblo Incident—Possible Legal Aspects Under International Law*, 20 S. CAROLINA L. REV. 487 (1968); Morrisson, *International Law and the Seizure of the USS Pueblo*, 4 TEXAS INT'L L. F. 187 (1968).

[142] M.A.C., 2d meeting, 28 Jul. 1953.

[143] M.A.C., 60th meeting, 5 Jul. 1955.

[144] M.A.C., 65th meeting, 21 Aug. 1955.

substantiated that 12 of the alleged violations had been unintentionally committed. In each case assurances were given that steps had been taken to prevent recurrences and that disciplinary action had been taken against responsible individuals.[145]

The first serious aircraft incident occurred on 5 February 1955, when a United Nations reconnaissance bomber, escorted by 12 sabre jets, was attacked over international waters off the west coast of Korea by four MIG's based in North Korea. The bomber returned fire in self-defense and in accordance with United States policy. The MIG's were also engaged by the escorting sabre jets, which shot down two of the MIG's over North Korean coastal waters.[146]

The unprovoked attack by the MIG's constituted violations of the *Armistice Agreement* in two respects: (1) it violated the cease-fire provisions; and (2) it furnished uncontroverted evidence that combat aircraft had been introduced into North Korea in violation of paragraph 13*d*. On 8 February 1955, Pyongyang radio admitted the planes were based in North Korea.[147] The most convincing evidence came on 9 February, when the Communist side charged a violation of their airspace in the shooting down of two MIG's above their coastal waters. By inadvertently admitting that the MIG's were owned by North Korea, they admitted that the aircraft had been illegally introduced into the North.[148]

The above attack was never satisfactorily settled. A further incident occurred over international waters between United States and Communist Chinese aircraft on 10 May 1955, when eight sabre jets downed two MIG's.[149] Since that time, most of the serious incidents involving aircraft resulted from the straying of aircraft over the Demilitarized Zone and the Military Demarcation Line.

On at least six occasions United Nations aircraft were brought down over North Korea by hostile fire.[150] In all cases there was no evidence that these planes had engaged in hostile acts. The pilots were eventually released to the United Nations Command.[151]

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[145] M.A.C., 4th meeting, 31 Jul. 1953.
[146] Dep't of State Statement, 23 Feb. 1955, 32 DEP'T STATE BULL. 426 (1955).
[147] *Id.*
[148] M.A.C., 53d meeting, 9 Feb. 1955.
[149] N. Y. Times, May 10, 1955, at 1, col. 1.
[150] M.A.C., 54th meeting, 10 Feb. 1955; M.A.C., 65th meeting, 21 Aug. 1955; M.A.C., 73d meeting, 10 Nov. 1956; M.A.C., 82d meeting, 10 Mar. 1958; N. Y. Times, May 19, 1965, at 10, col. 1.
[151] M.A.C., 65th meeting, 21 Aug. 1955; The Times (London), Aug. 22, 1955, at 5, col. 2; The Times (London), Mar. 18, 1958, at 8, col. 1; The Times (London), May 19, 1964, at 10, col. 3; N. Y. Times, May 22, 1965, at 7, col. 3.

The practice of the Communist side with respect to violations of their airspace is in marked contrast to their treatment of individuals who unintentionally crossed the Military Demarcation Line on the ground, and of harmless instructions by fishing vessels. It may be that the ease with which aircraft can maneuver and escape detection, and the great potential they possess for committing hostile acts justifies the extreme measures practiced by the Communist side. There is no legal justification, however, for shooting down aircraft not engaged in hostile acts. First, considerations of humanity would require a warning or, if necessary, a demand that the pilot land so that a determination could be made as to reasons for the violation. Second, the unrestrained firing on aircraft is not in keeping with the underlying spirit of the *Armistice Agreement*. Third, such conduct cannot be justified on the grounds of self-defense. Finally, it could be argued that such conduct cannot be justified as a reprisal, since the reaction is disproportionate to the gravity of the violation,[152] and since reprisals cannot be justified under the *Armistice Agreement*.

D. *SUMMARY*

The continued treatment of the *Korean Armistice Agreement* as a purely military convention has raised problems with respect to the legal status of captured members of opposing forces, primarily because the Agreement does not contemplate intentional violations by opposing forces. While the practice by the Communist side reveals that maritime and airspace violations are more severely handled, there is no legal justification for such a disparity of treatment.

V. CONCLUSIONS AND RECOMMENDATIONS

A. *CONCLUSIONS*

The customary rules of international law governing armistice status, insofar as they allow a resumption of hostilities, are no longer relevant to the present situation in Korea. This conclusion emerged from an analysis of the military and political conditions under which the armistice was concluded, the nature of the *Armistice Agreement*, the settlement of disputes arising during the armistice, and the practice of both sides in dealing with specific incidents. The conclusion was drawn from an appraisal of the following:

1. The armistice negotiations reveal that while the Commun-

[152] *See generally* OPPENHEIM, *supra* note 32, at § 250.

ists sincerely desired a cease-fire in Korea, their intent was not to establish an armistice in the traditional sense, but to restore the status quo as it had existed prior to the outbreak of hostilities.

2. The *Armistice Agreement*, although primarily military in scope, contains political stipulations, and by its own terms continues indefinitely. Consequently, it is structured to evolve into a political settlement.

3. The obligations placed upon the United Nations Command by the *United Nations Charter* severely limit the permissible range of options available under customary international law for insuring compliance with the *Armistice Agreement*. The continued violations by the Communist side, however, would justify a denunciation of the Agreement by the United Nations Command.

4. The continued treatment of the *Armistice Agreement* as a purely military convention has raised legal problems that could be avoided by the recognition of a new status to govern relations between the two Koreas.

B. *RECOMMENDATIONS*

Although the frustration of the *Armistice Agreement* by North Korea would justify a denunciation of the Agreement, it should be maintained for the following reasons:

1. One of our primary objectives in securing world order is to "preserve the effective existence of the United Nations." [153] In coming to the assistance of South Korea, the United States was acting in response to a request from the Security Council of the United Nations.[154] The continued presence of United States forces in Korea provides a basis for mediation by the world body. Any future action by the United States will command greater world respect if it is brought under the aegis of the United Nations.[155]

2. In the absence of cultural, technical, commercial, or diplomatic intercourse with North Korea, the Military Armistice Commission provides the United States with a vital contact for keeping the channels of communication open. Although the stated purpose of the Military Armistice Commission has been largely

[153] *Cf.* Hoyt, *The U.S. Reaction to the Korean Attack: A Study of the Principles of the U.N. Charter as a Factor in American Policy-Making*, 55 AM. J. INT'L L. 45, 53–54 (1961).

[154] *Id.* at 53. For the text of the Security Council resolution requesting military assistance, see U.N. GAOR, 5th Sess., Supp. 2 at 23 (1950).

[155] *Cf.* Hoyt, *The U.S. Reaction to the Korean Attack: A Study of the Principles of the U.N. Charter as a Factor in American Policy-Making*, 55 AM. J. INT'L L. 45 (1961).

supplanted by Communist propaganda, the Commission has succeeded in negotiating the release of captured personnel.

3. There is no reason why the *Armistice Agreement* cannot be amended to cover political questions. The Communists have taken the initiative in proposing that the Commission consider a resumption of commercial intercourse between the two countries.[156] By abandoning the concept of the Agreement as a purely military convention, the machinery is available for transforming the Agreement into a definitive treaty of peace.

[156] M.A.C., 78th meeting, 11 Oct. 1957. The U.N. Command rejected these proposals as being political and, therefore, not proper subjects for discussion by the Military Armistice Commission. The Communists used the same argument against the U.N. Command in reply to a request for the return of a Korean National Airlines plane and its cargo. The plane was on a routine flight from Pusan to Seoul when the pilot was forced to fly to North Korea. The senior members of the Korean People's Army and the Chinese People's Volunteers on the Military Armistice Commission insisted that the question was one to be worked out between the respective governments, and was not a proper question for the Commission.

APPENDIX

CHAPTER V

THE HAGUE REGULATIONS

Article 36.

An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

Article 37.

An armistice may be general or local. The first suspends the military operations of the belligerent states everywhere; the second only between certain fractions of the belligerent armies and within a fixed radius.

Article 38.

An armistice must be notified officially and in good time to the competent authorities and to the troops. Hostilities are suspended immediately after the notification, or on the date fixed.

Article 39.

It rests with the contracting parties to settle, in the terms of the armistice, what communications may be held in the theatre of war with the inhabitants and between the inhabitants of one belligerent State and those of the other.

Article 40.

Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.

Article 41.

A violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand the punishment of the offenders or, if necessary, compensation for the losses sustained.

By Order of the Secretary of the Army:

W. C. WESTMORELAND,
General, United States Army,
Chief of Staff.

Official:

KENNETH G. WICKHAM,
Major General, United States Army,
The Adjutant General.

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ARNG and USAR: None

☆ U.S. GOVERNMENT PRINTING OFFICE: 1970—390-819/6789B